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In The
Supreme Court of the United States

KATINA ESTELLE DART,
Petitioner,

v.

ROBERT CHARLES DART,
Respondent.

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

1. **WHETHER, BECAUSE OF THE FUNDAMENTAL AND CRITICAL IMPORTANCE OF UPHOLDING DUE PROCESS, THE COURTHOUSE DOORS SHOULD BE CLOSED TO UNITED STATES CITIZENS, SUCH AS PETITIONER, BASED UPON RECOGNITION OF A FOREIGN JUDGMENT, UNDER THE GUISE OF *RES JUDICATA* AND COMITY, WHICH WAS RENDERED UNDER A SYSTEM OF LAWS WHICH ARE REPUGNANT TO OUR HIGHLY VALUED PRINCIPLES OF DUE PROCESS?**

PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Petitioner Katina Estelle Dart respectfully prays that a Writ of Certiorari issue to review a final order of the Michigan Supreme Court.

OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on July 20, 1999, and reported as *Dart* v. *Dart* 460 Mich. 573, 597 N.W.2d 82 (1999) (Appendix A), and an Order was entered affirming the Court of Appeals' decision on July 20, 1999. (Appendix B) The Michigan Supreme Court's Order denying the motion for rehearing was filed on September 14, 1999. (Appendix C) The decision of the Michigan Court of Appeals, on interlocutory appeal from the Ingham County Circuit Court, was filed on June 10, 1997, and reported as *Dart* v. *Dart*, 224 Mich. App. 146, 568 N.W.2d 353 (1997). (Appendix D) The Michigan Court of Appeals Order denying the motion for rehearing was filed on August 1, 1997. (Appendix F)

JURISDICTION

This Petition is the result of the decision of the Michigan Supreme Court issued July 20, 1999, which affirmed the Michigan Court of Appeals' decision filed on June 10, 1997 that dismissed Petitioner's divorce action which was pending in the Michigan Circuit Court for Ingham County. Petitioner's motion for rehearing of the decision of the Michigan Supreme Court was denied by an order entered

September 14, 1999. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 5th and 14th Amendments to the United States Constitution, along with pertinent federal and state statutes and rules, are reproduced in Appendices G - J.

STATEMENT OF THE CASE

In light of the international trend toward becoming a "world without borders," this Petition presents this Court with a unique opportunity to underscore and prioritize the prized and core values of our American society of fairness and equality, as embodied in our constitutional jurisprudence. As we enter the new millenium and United States citizens travel abroad, our courts will require clear guidance from this Court that, although our Constitution cannot be imposed upon foreign governments and tribunals, Due Process is a vested right of every United States citizen and that vested right is not lost by traveling to a foreign country. This Court, by taking action in this case, can manifest that the constitutional rights of our citizens as it affects their fundamental familial interests within this country are inviolate and cannot be divested by foreign tribunals which proceed under systems of laws repugnant to our constitutional mandates and notions of fairness and equality.

Petitioner, Katina Estelle Dart, is a United States citizen and Michigan resident who has been denied any

recognition by any court of the United States of, or relief from, the biased, unfair and constitutionally-repugnant treatment she received by the courts of England during a divorce proceeding instituted by her husband of 19 years, Robert Charles Dart. Mr. and Mrs. Dart were born, raised, educated, married, lived and became the parents of two children, all in Michigan. Mr. Dart was and is one of three heirs to the vast fortune accumulated by the Dart family–one of the wealthiest families in the United States–resulting largely from Dart Container Corporation, a manufacturer of styrofoam and plastic cups and other similar products. At the time he filed for divorce, Mr. Dart's estimate net worth approximated $1.6 billion.

In the fall of 1993, 13 years after their marriage and continuous residence in Michigan, Mr. Dart induced Mrs. Dart and their children to temporarily live in England, while still maintaining their home in Michigan because, according to Mr. Dart, they needed to relocate to England so that Mr. Dart could work for a temporary period in London and earn a substantial distribution from a certain Dart family trust. Once in England, on or about January 5, 1995, Mr. Dart obtained an approximately $700 million distribution from the trust. Prior to receiving the distribution, Mr. Dart renounced his United States citizenship, while becoming a citizen of Belize and Ireland, and thereby avoided paying several hundreds of millions of dollars in state and federal taxes.

Mrs. Dart adamantly refused to renounce her citizenship or allow the renunciation of the children's citizenship.

During their stay in England, in or about January 1995, the parties, after an extended period of the deterioration and ultimate breakdown of the marital relationship, decided to divorce and agreed that the divorce would be obtained in Michigan upon their return after the end of the children's school year. Mr. Dart urged and persuaded Mrs. Dart to forebear from commencing divorce proceedings until the end of the school year and their return to Michigan. Mr. Dart acknowledged in deposition testimony that Mrs. Dart was reasonable to rely upon his assurances that they would wait until the Summer of 1995 to divorce in Michigan.

Contrary to his assurances, less than a month later Mr. Dart filed for divorce in the High Court of Justice, Family Division, in London, England (the "English Court") on February 4, 1995, and had Mrs. Dart served with the divorce papers on a Saturday morning in the parties' rented house in London while the children were present. Simultaneously with filing for divorce, the parties children were made wards of the English Court based upon Mr. Dart's *ex-parte* petition, and the children's passports were seized so that they were barred from leaving England, unless Mrs. Dart appeared before the English Court. At the time of filing for divorce, Mr. Dart canceled all of Mrs. Dart's lines of credit, closed their bank accounts, and notified local stores that she was no longer

authorized to buy on credit. The net result was that Mrs. Dart was stranded in England without any funds to provide for her or her children's needs or to return to Michigan, and her children were being held hostage by the English Court so that she could not return with them to Michigan. Because Mr. Dart knew she would not leave her children in England and could not survive without support, Mr. Dart succeeded in forcing Mrs. Dart to appear before the English Court. On February 7, 1995, Mrs. Dart, through a representative, filed for divorce in the Michigan Circuit Court for Ingham County. However, unbeknownst to Mrs. Dart, the moment she stepped before the English Court to protect and retrieve her children, the doors to the Michigan courts slammed shut upon her, according to the Michigan Court of Appeals and Michigan Supreme Court, and her filing would not, without intervention of this Court, protect her.

At every opportunity, Mrs. Dart objected to the English Court's jurisdiction over the parties and its wardship of the children, and moved to have the English case dismissed but the English Court flatly denied her request. Mr. Dart attempted by motion to have the Michigan divorce case dismissed because of *forum non conveniens* and because he was the first to file, but his maneuver was denied by the Ingham Circuit Court.

A trial date in Michigan was set for April 8, 1996. Unfortunately, Mr. Dart was able to manipulate the English

Court into rendering judgment first, based upon its limited inquiry into a husband's assets in so-called "Big Money" cases, and the English Judgment (Appendix K) was issued by Justice Johnson on March 21, 1996 after a seven day proceeding (the "English Proceeding"). Previously in the English Proceeding, the English trial judge, Mr. Justice Johnson, commented on the limited discovery in what the English call "Big Money" cases:

> It seems to me that in Michigan the financial proceedings will take much longer than here in England because there will be a need for enquiry and discovery that will not exist here. . . I think it comes to this on your discovery point, that here you do not really have to go into detail, whereas in Michigan (where it is 50/50) it is obviously important to ascertain 100%.

The lump sum payment awarded to Mrs. Dart in the English Judgment was based upon her "reasonable requirements" or "needs" (akin to "alimony-in-gross" in Michigan), and was so insignificant in light of the magnitude of the parties' wealth that it could have been paid from less than three months of Mr. Dart's income without ever invading one cent of the marital estate. Mrs. Dart was not awarded any of the parties' personal property located in England or other assets of the marital estate–other than the lump sum for her support--but rather was only allowed to retain some of the assets which remained in Michigan which, because Mr. Dart

had renounced his citizenship, he could not retrieve and were outside the reach of the English Court.

Perhaps the most perfect example of Mrs. Dart's unfair and biased treatment in the English Court is that, as part of the English Judgment, Mrs. Dart was further bludgeoned by the English Court when it ruled that she must pay all of Mr. Dart's costs, expenses and attorney fees, which exceed $1 million, because she sought discovery for which the English Court harshly penalized her because, in Justice Johnson's view of English law in "Big Money" cases, Mrs. Dart had "caused the case to be conducted in an extravagant way and certainly the discovery she sought in my judgment was wholly unnecessary" and he wanted to "take sufficient account of [Mrs. Dart's] insistence on discovery." Apparently, Mrs. Dart's seeking to enforce her due process right to participate in the proceedings in a meaningful way–which is taken for granted in the United States–was a bold affront to the English Court.

As expected, Mr. Dart then utilized the first-in-time but unfair English Judgment as grounds to seek dismissal of the Michigan divorce. Mrs. Dart, at that juncture, raised the issues presented by this Petition by objecting to the English Judgment because she was denied any meaningful opportunity to present her case based upon the lack of discovery allowed and the refusal of the English Court to consider the value of the marital estate, and that she had been

deprived of her right to an equitable division of the marital estate because of the biased and repugnant system of divorce laws in England. On April 8, 1996, the Ingham Circuit Court denied his request because, in the court's opinion, the English Judgment was nothing more than an award of alimony and did not amount to a determination or equitable division of the marital estate, that full discovery was disallowed by the English Court, and that the English system of divorce laws places an unfair ceiling, which does not exist in Michigan, on awards to wives in "Big Money" cases. The Ingham Circuit Court judge, at a hearing, found, regarding the English system of divorce laws, that:

> Such a system is repugnant to our American traditions and to the divorce laws of Michigan. In Michigan, both of these parties will be given an equal opportunity to share in the jointly accumulated assets of their marriage.

Surprisingly, the English Court of Appeal, which is the highest English tribunal which reviewed the decision of the English Court, also questioned the bias and unfairness present in the English system. (Appendix L). Two of the three justices which heard the case qualified their affirmance of the English Judgment with "were I unconstrained by authority" and "if this appeal were not bound by authority." (*See* L39, L45) Even more shocking is that one justice stated that the English approach in awarding only the "reasonable

requirements" to wives in "Big Money" cases was "incorrect." However, constrained by previous authority, the court then regrettably affirmed the English Judgment.

In spite of the English Court of Appeal's recognizing the limitations and bias of England's system of divorce laws, Mr. Dart then filed an interlocutory application for leave to appeal the Ingham Circuit Court's denial of his request, and his request for leave to appeal was granted by the Michigan Court of Appeals on April 10, 1996. The Michigan Court of Appeals then summarily reversed the trial court's decision, and dismissed Mrs. Dart's divorce proceeding in its entirety, based upon comity, *Res Judicata* and the Uniform Foreign Money Judgments Act, M.C.L. § 691.1151-1159; M.S.A. § 27.955(1)-(9) ("UFMJRA"). (Appendix I) Thereafter, the Michigan Court of Appeals denied Mrs. Dart's petition for rehearing, and Mrs. Dart filed an application for leave to appeal to the Michigan Supreme Court on August 22, 1997, which was granted on October 12, 1998. On July 20, 1999, in a 5-2 decision, the Michigan Supreme Court affirmed the decision of the Michigan Court of Appeals based upon comity and *Res Judicata* only, and Petitioner's request for a rehearing was denied on September 14, 1999. Thus, this Petition was filed.

SUMMARY OF ARGUMENT

In their rush to dispose of her case, the Michigan Supreme Court ignored the English Court's violation of

Petitioner's Due Process rights and, in the process, further violated her constitutional rights pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Relying upon principles of Comity and *Res Judicata*, the Michigan Supreme Court upheld the English Judgment, which, based upon biased yet controlling English precedent, deprived Petitioner of her rightful share of the marital estate and barred her from conducting discovery and engaging in other procedures that would have preserved her property interests. Worse, the English Judgment was rendered after Petitioner's children were made wards of the English Court, had their passports seized and were not allowed to leave the jurisdiction of the English Court. This Court should grant this Petition and review the outrageous actions taken by Respondent, as well as the biased pronouncements and actions taken by the English Court as required by English precedent.

REASONS FOR GRANTING THE WRIT

I

BECAUSE OF THE FUNDAMENTAL AND CRITICAL IMPORTANCE OF UPHOLDING DUE PROCESS, THE COURTHOUSE DOORS SHOULD NOT BE CLOSED TO UNITED STATES CITIZENS, SUCH AS PETITIONER, BASED UPON RECOGNITION OF A FOREIGN JUDGMENT, UNDER THE GUISE OF *RES JUDICATA* AND COMITY, WHICH WAS RENDERED

UNDER A SYSTEM OF LAWS WHICH ARE REPUGNANT TO OUR HIGHLY VALUED PRINCIPLES OF DUE PROCESS.

A

The English Judgment was rendered under a system of laws repugnant to Due Process, which resulted in a violation of Petitioner's Due Process rights, both procedural and substantive, and the English Judgment should not have been enforced in the United States.

Through the Constitution, the People of the United States preserved inviolate certain basic and fundamental rights to each citizen, including Due Process, which is, at its core, the right to be treated fairly by state actors, both in terms of manner and substance. White or black, rich or poor, male or female-- we are entitled to the exact same treatment under our jurisprudence. While the American people consider our principles of equality and fairness to be ideal, we remain cognizant that many countries do not share our ideals or enforce and safekeep them as do we. However, regardless of our lack of right or power to impose our ideals on other nations and the wide disparity of rights and laws in existence, we have every right and duty to enforce our prized ideals within our nation's borders, especially to protect one of our own citizens (and an American family) against the bias and denial of Due Process by the laws and practice of foreign tribunals. Although we may do no more, we must do no less.

In the system of divorce laws in England, vestiges of an undeniable bias against women are still present based upon England's adherence to age-old notions of male dominance *and entitlement, inherited wealth and* primogeniture. English jurisprudence has simply not yet caught up with ours relating to treating all persons equally under the law regardless of gender. This fact is not necessarily derogative to the English people because we cannot expect that all societies will foster and enforce the same ideals at the same rate and, moreover, England's jurisprudence and culture are obviously much older and, therefore, more entrenched than ours. However, this Court should not allow Due Process, along with gender equality and fairness as we have adopted, to be diminished, violated or ignored by an English Judgment which is tainted with bias that we have banished from our midst. The tainted English Judgment should never have been enforced by the Michigan courts, and this Court should intervene to correct their error.

a. The "Trilogy" of English Precedents

Three cases form the precedential framework which denied Petitioner her right to Due Process during the English Proceeding and thereby properly render the English Judgment repugnant and unenforceable by any American court. They are: *Preston* v. *Preston*, 1981 2 FLR 331; *Duxbury* v. *Duxbury*, 1987 1 FLR 7; and *Thyssen-Bornemisza* v. *Thyssen-Bornemisza*, 1985 1 FLR 1069. In *Preston*, the English

Court's inquiry in "Big Money" cases (those in which the available resources are large) was limited to a single inquiry: what are the wife's "needs"? *Preston* established that in cases where the amount of assets is large, there is a maximum sum–the so-called "*Preston* ceiling"–that limits the award to an amount that satisfies the English Court's estimation of a wife's need for support. As frequently occurs in appellate courts, the English Court of Appeal, after *Preston*, quickly seized the opportunity to create a "test" to answer the question of how to calculate the wife's "needs" under *Preston*. The answer was found in *Duxbury*, which yielded the "*Duxbury* Calculation," which determines that a wife's "needs" is equal to a lump sum of support calculated by reference to the wife's projected income needs over her life expectancy on the assumption that the capital element of the lump sum will be reduced to the point at which both capital and income will be exhausted at the end of the period of the wife's life expectancy. Because Preston had limited the wife's recovery to her "needs," the English courts also determined that it would be beneficial if the disclosures and discovery conducted could also be similarly limited. As a result, *Thyssen-Bornemisza* held that the wife's ability to conduct any inquiry into assets is severely limited in "Big Money" cases. Because, based upon the *Preston* ceiling, the wife has no hope of recovering more than her "needs," the *Thyssen-Bornemisza* Court held that, if the husband makes a disclosure

that he has sufficient assets to satisfy an award of his wife's "needs," no discovery may then be conducted.

b. The Violation of Due Process

The foregoing trilogy of English precedents was controlling law during the English Proceeding, and effectively denied Petitioner Due Process, both procedural and substantive. Due Process is embodied in the United States Constitution in the Fifth Amendment (Appendix G), which is applicable to the States pursuant to the Fourteenth Amendment. (Appendix H) Both of such Amendments provide that no person shall be deprived "of life, liberty or property, without due process of law." *Id.* As this Court is well aware, due process protections under the Fourteenth Amendment have two components: procedural due process and substantive due process. A cogent description of the elements of procedural due process and substantive due process is set forth in *Amsden* v. *Moran*, 904 F.2d 748, 753-754 (1st Cir. 1990):

> The essentials of procedural due process comprise notice of the charges and a reasonable chance to meet them. The basic purport of the constitutional requirement is that, before a significant deprivation of liberty or property takes place at the state's hands, the affected individual must be forewarned and afforded an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85

> S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). As the rubric itself implies, "procedural due process" is simply "a guarantee of fair procedure." *Zinermon* v. *Burch*, 494 U.S.113, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).
>
> * * *
>
> When a procedural due process claim is advanced, the proper focus must be on the manner in which the state has acted: "how and when" the alleged deprivation was effected. In contrast, a substantive due process claim implicates the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible. . . .
>
> * * *
>
> As distinguished from its procedural cousin, then, a substantive due process inquiry focuses on "what" the government has done, as opposed to "how and when" the government did it. [citations omitted]

Obviously, the English Judgment was issued by the English Court, which is not constrained by the United States Constitution. However, the Michigan courts, by enforcing the repugnant Foreign Judgment under a superficial and conclusory application of the judicially-created doctrines of Comity and *Res Judicata*, have ratified the violation of Petitioner's Due Process rights by the foreign tribunal and thereby also violated Petitioner's Due Process rights, and

thereby also violated Petitioner's Due Process rights, and have provided a framework through which other foreign judgments, even if repugnant and violative of the constitutional rights of United States citizens, will be welcomed and enforced by American courts. By placing the imprimatur of the state of Michigan upon the English Judgment, the Michigan Supreme Court has also deprived Petitioner of her Due Process rights. A deprivation of Due Process accomplished by the courts of a state does not lessen the deprivation or make it less actionable than if the deprivation had been accomplished through legislative, executive or administrative action. *Shelley* v. *Kraemer*, 334 U.S. 1, 14; 92 L.Ed. 1161; 68 S.Ct. 836 (1948).

The deprivation which Petitioner has suffered at the hands of the State of Michigan has been her property right to an equitable division of the marital estate.

> Property rights are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as a state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [*Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701,33 L.Ed.2d 548, 561 (1972)].

The property rights in this case, of which Petitioner has been deprived by the courts of the State of Michigan, are

> Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.[M.C.L. §552.19; M.S.A.§ 25.99].

This section has been interpreted by the Michigan courts to mean that the property division in a divorce should be equal, absent special circumstances. *Jansen* v. *Jansen*, 205 Mich. App. 169, 171, 517 N.W.2d 275 (1994). "An equitable distribution of marital assets means that they will be roughly congruent." *See, also*, *Pusylo* v *Pusylo*, 279 Mich. 623, 625, 273 N.W. 292 (1937). Moreover, Mrs. Dart possessed a right to her cause of action for divorce and an equitable division of the marital estate and support, and a cause of action is deemed property for purposes of the Due Process Clause of the Fourteenth Amendment. *Bush* v. *Reid*, 516 P.2d 1215, 1219 (1973).

Mrs. Dart was denied Due Process because of the divergence between Michigan and English divorce laws, because the English divorce laws are inherently biased and that bias resulted in the violation of Mrs. Dart's Due Process rights. In England, once a case is found to be a "Big Money" case, the *Preston/Duxbury/Thyssen-Bornemisza* trilogy of

case, the *Preston/Duxbury/Thyssen-Bornemisza* trilogy of precedents is triggered, and the goal is no longer an equitable division of the marital estate but the protection of large fortunes from the any claim of right to an equitable portion by women and children as part of a divorce action and the bar of discovery of the true extent of the marital estate as long as the husband can demonstrate that he has sufficient assets to pay the amount awarded by the English tribunal for his wife's "needs." The wife is immediately divested of any claim to an equitable portion of the marital estate and barred from pursuing it, while the remaining portion of the marital estate is considered to belong to the husband. Payment of any amount in excess of the wife's "needs" amounts to a "redistribution of capital" which is not allowed. *See*, *Preston* at 339. Even beyond the procedural unfairness of barring a wife from learning of the extent of the marital estate through discovery, the concept that all of the assets necessarily are the property of the husband (from which a "redistribution" must be prevented), and he then pays to his wife a sum to meet her "needs" is substantively repugnant to our long-established principles of gender equality.

Based upon the *Duxbury* Calculation, the English Court allowed testimony regarding Mrs. Dart's "needs" and, in the English Judgment, awarded her what amounts to less than 1% of the suspected marital estate of $1.6 billion. Under *Duxbury*, this amount was calculated so that she would be

penniless at the time of the expiration of her anticipated life expectancy. While there are no definitive yardsticks to define "equitable," certainly less than 1% is incredible and would have not occurred in Michigan. Of course, the English Court was not concerned with equity, but only with providing Mrs. Dart with enough funds to meet her determined "needs." She was not entitled to any equitable portion of the marital estate, and was outright denied her property right in any of the remainder of the estate. Even more egregious, the English Court slapped Mrs. Dart with sanctions anticipated to exceed $1 million as punishment for even attempting to ascertain the true value of the marital estate. In doing so, the English Court stated:

> The extravagance of the preparations in this case defies moderate description. The husband's initial disclosure [as per *Thyssen-Bornemisza*] was in my view adequate, I would say more than adequate, for the purpose of these English proceedings. Nonetheless on the wife's behalf repeated requests were made for yet further information and yet further documents. . . . the responsibility for this extravagant, and indeed scandalous, waste of money does not, I suspect, lie with the wife's English lawyers but rather her attorneys in the United States. [*See* K13-14].

In spite of the English Court's view that Mrs. Dart, under English law, was not entitled to any further portion of the marital estate – ***or to even determine what the marital***

estate was through discovery – Mrs. Dart did possess a substantive due process right in an equitable portion of that estate and a procedural due process right to pursue it, both of which were flatly denied to her.

This Court should also grant this Petition because of the erroneous, circular and result-oriented nature of the Opinion of the Michigan Supreme Court on these issues. Importantly, this Court should note that, when reviewing the *Preston/Duxbury/Thyssen-Bornemisza* trilogy, the Michigan Supreme Court, in the majority opinion written by Justice Marilyn Kelly (A-13), noted that "[h]ad the English Court actually used this formulation to divide the parties' marital assets, we might agree with [Petitioner] that she was denied due process." Of course, the court then proceeded to erroneously hold that the trilogy was not applied to Mrs. Dart. As noted by the dissenting opinion written by Justice Michael F. Cavanagh (A-18):

> I must part company with the majority on the deference shown to the English Court's judgment. While I agree with Justice Kelly that the English Court did not apply the *Preston* "ceiling" rule in this case, but rather steered away from such a ruling to find the bulk of defendant's assets to be nonmarital property, I am unpersuaded that such a finding removes the English decision from the looming shadow of *Preston*.

As even the majority tacitly admits, the

application of the Preston rule in a case such as this (or in any case for that matter) would likely raise serious due process concerns. The mere existence of such a rule . . . . suggests that, at least in cases in which substantial assets are involved, the goals of the English judicial system in marital dissolution cases differ substantially from the framework of our state. . .Where plaintiff was in the exact position necessary for her to suffer the ill effects not only of the Preston rule, but also the underlying statutory rationales for it, I cannot say, particularly in view of the asset division undertaken by the English Court, that she escaped unscathed by the effects of the adverse predispositions demonstrated. . . . it is necessary to consider, given the majority's reliance on the determination of the trust assets as nonmarital in nature, what sort of effect would have occurred had Justice Johnson of the English Court found the entire amount of disputed property (including the trust assets) to be consist of marital assets. While the justice postulated that he personally would have no difficulty awarding plaintiff half the assets in such a case, he also noted that whether that would be permitted under the law would be another matter. Indeed, the Preston rule would appear to dictate that, regardless of his decision, plaintiff was predestined to receive only a fraction of the disputed assets . . . It is difficult to give due process credence to a system in which the result would remain adverse to the plaintiff whether or not she prevailed on the point the majority determines the case should be decided upon.

. . . .I am nonetheless convinced that the

> operation of the English system of marital asset division in cases involving substantial assets reflects considerations very different from our own, and that such considerations cast a shadow on the decision sufficient to preclude Michigan courts, with our well-established criteria for property distribution in divorce cases, from recognizing a decision that is not only from another land, but truly foreign to the concepts underlying Michigan law.

Justice Cavanagh's dissent demonstrates the circular reasoning of the majority opinion. The majority determined that, because there was no evidence to rebut the presumption that the trust assets were separate property, the English Court's determination must have been correct that the trust assets were, in fact, separate property. However, the crux of Mrs. Dart's appeal was that she was denied, because of the rule of *Thyssen-Bornemisza*, of any opportunity to discover or present to the English Court any facts or other evidence that would have proven the trust assets should be considered part of the marital estate. In fact, she was severely sanctioned by the English Court for trying to do so. The majority's decision only further proves that Mrs. Dart was denied Due Process because she was barred from determining the extent of the marital estate and other facts which, based upon the majority's use of the lack of evidence on those issues to rule against her, was dispositive and crucial to her claims. It is ironic and also underscores the divide between the Michigan

and English systems because the very same evidence which the Michigan Supreme Court determined was crucial and dispositive of her claims was held wholly unnecessary and a mere request seeking that information warranted extreme sanctions. In its discretion, the Michigan Supreme Court should have remanded the case to the trial court so that findings could have been made whether the trust assets really were separate property, after Mrs. Dart was accorded her procedural due process rights to obtain and present evidence that those assets were not separate property. For example, the Michigan Supreme Court erroneously reasoned that, because Mrs. Dart was awarded certain personal property by the English Judgment, she was therefore necessarily afforded Due Process and a sufficient right to obtain discovery. However, because of the complete lack of a factual record in the Ingham Circuit Court, the fact that such personal property was not in reality awarded to her by the English Judgment but was property abandoned by Mr. Dart in Michigan when he became an expatriate was not considered by the court. also, Mrs. Dart was not allowed, at any point in the proceedings, to prove that the lump sum payment awarded to Mrs. Dart for her "needs" was alimony-in-gross and not a division of the marital estate. Because complete factual findings crucial to the issues were not part of the record, and Petitioner has been denied any chance to develop her case, the Michigan Supreme simply applied their analysis to erroneous and undeveloped

facts. The decision of the Michigan Supreme Court should be reviewed and, upon a determination of these errors and deficiencies, it should be reversed and remanded.

B

This Court should not allow the doctrines of Comity and *Res Judicata* to be used to circumvent and ignore the violation of the Due Process rights of United States Citizens, such as Petitioner, by a foreign tribunal.

Although England obviously is not bound by our Constitution, the instant that a judgment rendered in an English tribunal is presented for recognition in the United States, American courts should subject it to strenuous review and no presumption should be made that the laws of the foreign jurisdiction honor Due Process. However, in reality, the principles of Comity and *Res Judicata* are used as nothing more than mere "rubber stamps" to adjudge both whether the judgment will be recognized and, if so, the effect the judgment will be given by our courts. Such a cursory review is inadequate, especially in the context of an American family which was only present in the foreign country on a temporary work permit.

A foreign judgment is not entitled to recognition by the Michigan courts if it violates public policy or is repugnant to or violative of Due Process. "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. Moreover,

due process requires that no other jurisdiction shall give effect, **even as a matter of comity**, to a judgment elsewhere acquired without due process," *Griffin* v. *Griffin*, 327 U. S. 220, 228-229, 66 S.Ct. 556 90 L.Ed. 635, 640, (1945) (citations omitted; emphasis added).

Similarly, *Res judicata* and collateral estoppel are judge-made rules created to improve the efficiency of the courts. However, "[r]es judicata and collateral estoppel are to be qualified or rejected when their application would contravene a substantial public policy." *Horn* v. *Department of Corrections,* 216 Mich. App. 58, 64, 548 N.W.2d 660 (1996). The purpose of the preclusion doctrines of *Res Judicata* and collateral estoppel has been set forth in *Nummer* v. *Department of Treasury*, 448 Mich. 534, 541, 533 N.W.2d 250 (1995):

> The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation (citations omitted). **However, [r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation** (citations omitted, emphasis added). *Montana* v. *United*

States, 440 U.S. 147, 164, note 11, 99 S.Ct. 970, 59 L.Ed.2d 210, 223 (1979).

***

> One general limitation is that the concepts of claim and issue preclusion (res judicata in the broad sense) cannot apply when the party against whom the earlier judgment is asserted did not have a full and fair opportunity to litigate the issue in the earlier case (citations omitted). *Jones* v. *City of Alton*, 757 F.2d. 878, 884 (7th Cir. 1985).

In this case, neither Comity nor *Res Judicata* should have been used to allow enforcement of the English Judgment in the Michigan courts. As noted by Justice Cavanagh in his dissent, the English Judgment is "a decision that is not only from another land, but truly foreign to the concepts underlying Michigan law." (A-20) As an example of the English slant against women, Mr. Justice Johnson, in his fraternal benevolence, provided Mrs. Dart with a slight bit more of an allowance for her routine support (similar to spending money given to a child) so that she could "indulge" herself by purchasing "a particularly splendid outfit for some particular event" or perhaps a "picture." (K-34). Mrs. Dart was not only harmed and prejudiced by the English system of divorce laws, but also by the ingrained notion that women are like mere chattels.

Petitioner has been denied due process of law in the

English Proceedings because the Court barred her from obtaining discovery of the marital estate, and ignored the little evidence as to the value of the marital estate that she was able to obtain independently and present as irrelevant and immaterial. She did not receive a full and fair hearing in the English Court and the Michigan Courts acted against the dictates of the Fifth and Fourteenth Amendments in recognizing and enforcing of English Judgment.

Additionally, *Res Judicata* is an equitable remedy. Certainly the equities in this case are in favor of Petitioner. Respondent, an expatriate, renounced his United States citizenship for tax avoidance purposes, conduct the Congress of the United States is currently investigating as contrary to the best interests of the United States and unfair to the taxpayers of the United States. Respondent did so, and induced Petitioner and the children to set up a temporary residence in England so that he could receive and earn a **$400 million** trust distribution. Respondent outright lied to Petitioner when he promised and agreed that the parties would divorce in Michigan after the end of the school year when the children would be home in Michigan, in their familiar surroundings and in the marital home which they continued to maintain in Michigan, by filing, less than a month later, for divorce and maneuvering the English Court to trap the parties' children (and effectively Petitioner) in England by making the children wards of the English Court on an *ex*

parte basis and to order the surrender of the children's passports to the English Court. All after Petitioner had fulfilled her husband's wishes and set up a new household in England, taking the children from their friends and surroundings and placing them in a foreign culture. Petitioner took herself away from her family and friends to accompany her husband. Mr. Dart was not entitled to equitable relief because of his unclean hands and devious motives prior to and throughout the entire divorce process.

This Court must intervene in this matter to underscore that Comity and *Res Judicata* are not "rubber stamp" doctrines to be applied in the place and stead of a thorough review and analysis of any allegations that a citizen's Due Process rights were violated by the foreign tribunal which rendered the foreign judgment for which recognition by American courts is sought.

CONCLUSION

There are no rights more fundamental or important than our constitutional rights. According to the erroneous decision of the Michigan Supreme Court, those rights apparently cease to exist for United States citizens at the border, when United States citizens are traveling abroad temporarily to a foreign country, on work permits, who are then without constitutional protections when they are hauled into a foreign court, even if their children are made involuntary wards of that court and barred from leaving the

foreign country as a tactic to force that person to appear and subject herself to the power of that tribunal. Although we, as a country, cannot force any foreign nation to uphold our Constitution or our gender neutral laws or our respect for the importance of family and the equality of the wife in the family, we can (and must) refuse to enforce any judgment rendered by that tribunal through use of our courts and to allow the inequities, biases and abuses of that foreign system of laws to harm our citizens once they return to the United States, especially after an American citizen has sought the intervention and protection of our courts against the foreign judgment.

In this case, the lower courts (other than the trial court which found for Petitioner) have chosen to slam the court doors shut to Petitioner because of the English Judgment, even though such judgment was rendered by a system of laws which violate our most basic notions of equality and Due Process. In England, her hands were tied. Her children were made wards of the English Court, *ex parte*, and their passports were seized thereby stranding them in England until further order of the English Court. She was not entitled to conduct meaningful discovery of the marital estate of which she was entitled, as a property right, to an equitable portion. The information she was able to obtain was ignored outright as irrelevant by the English Court based upon controlling precedent. She was not allowed to pursue her entire claim,

but rather was limited to, at a maximum, an amount sufficient to meet her "needs" during her expected lifetime. The case at bench perfectly illustrates the injustice that results when Comity and *Res Judicata* are used as mere "rubber stamps" for a thorough constitutional review and our courts are used as facilitators of enforcement of foreign judgments. In this case, the highest English court to review the English Judgment itself questioned the correctness of the limitations on discovery and entitlement in divorce cases involving substantial assets. Even the Michigan Supreme Court, in the majority opinion which ruled against Petitioner, noted that the controlling English divorce precedents, if applied, would cause serious constitutional concerns and potentially a denial of Due Process to Petitioner, and the dissenting opinion did not agree that Petitioner was afforded Due Process in light of the low value of the award to her in the English Judgment. This case illustrates the triumph of a race to the courthouse and deceit over constitutional guarantees. American citizens travel more frequently and work more extensively in foreign countries than ever before. Many involve foreign languages, all involve foreign customs and different laws. American families must have their very fabric protected from the naive and false assumption of comparable treatment. American women do not put down their right to equality and their constitutional guarantees when the pick up a passport. This Court should grant this Petition, and review this matter fully

so that Due Process will not be diminished by any application of the lower court decisions as precedent, and the violation of Petitioner's Due Process rights can be addressed.

Respectfully Submitted,

_____

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Michigan Supreme Court
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Chief Justice
Elizabeth A. Weaver

Justices
James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young

OPINION

FILED JULY 20, 1999

KATINA ESTELLE DART,

Plaintiff-Appellant,

v

No. 110361

ROBERT CHARLES DART,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

KELLY, J.

We granted leave to determine whether the parties' English divorce judgment is entitled to full faith and credit under the principle of comity, and whether res judicata bars

the action. [1]

We hold that principles of comity and res judicata mandate that the Darts' foreign divorce judgment be enforced. The English court decided the property distribution issue on the merits, and no evidence was presented showing that plaintiff Katina Dart was denied due process. We affirm the decision of the Court of Appeals.

I. FACTS

Plaintiff and defendant were married in 1980 and were residents of Okemos, Michigan until 1993, when they moved to England. The couple owned a large house in Okemos, situated on thirty-nine acres of land, valued at $1,500,000. The parties had two children. The defendant is the son of the founder of Dart Container Corporation, one of the largest family-controlled businesses in the United States. The defendant's earned income for the years 1992, 1993, and 1994, was $313,009, $563,917, and $281,548, respectively. Between 1990 and 1993, the family's annual expenditures

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[1] We note that the lower courts considered whether the Uniform Foreign-Money Judgments Recognition Act (UFMJRA), MCL 691.1151 *et seq.*; MSA 27.955(1) *et seq.*, applied to the facts of this case. However, even it the UFMJA did not apply, we can decide this issue under the general principle of comity. See Bang v Park, 116 Mich App 34; 321 NW2d 831 (1982). We note, also, that the circuit court's jurisdiction was not raised as an issue in the Court of Appeals.

ranged from $300,000 to $600,000. The move to England made possible a September 1993 transfer of several hundred million dollars to the defendant from family trusts.

In 1974, before the marriage, the defendant's father established a trust for the benefit of defendant and his brother. For the transfer to occur, defendant had to renounce his United States citizenship and relocate outside the United States. The plaintiff refused to renounce her United States citizenship, and she also refused to renounce the citizenship of the children. She claims that, despite the relocation to London, England, she has always considered herself a resident and domiciliary of Okemos, Michigan.

In 1993, the parties jointly purchased a house near London for £2.75 million, and began renovations that over a year to complete and cost another £3.5 million. They enrolled the children in the American School of London. Between 1993 and 1995, plaintiff asserts that she and the children made regular trips to Michigan for holidays, medical care, vacations, haircuts and other activities. Also, she maintained her Michigan driver's license and voted regularly in Michigan elections.

In September 1993, defendant received his distribution from the family trust which had a present, net value of £274 million (approximately $500,000,000). In the fall of 1994, plaintiff announced that she wanted a divorce. She revealed that what she had previously described to the

defendant as a "one night stand" in 1989 had actually been a regular, adulterous affair with a man in Greece. The plaintiff asserted that she and defendant agreed to postpone the divorce action until she and the children returned to Michigan after the 1994-95 school year.

Despite the putative agreement, defendant filed for divorce in England on February 3, 1995. Plaintiff was served with process at the parties' home the following day. She contacted her American attorneys, and they filed a similar suit on her behalf in Michigan in the Ingham County Circuit Court four days later. The parties remained in England until a consent order was entered in the English Court on June 9, 1995, allowing plaintiff to return with the children to Michigan.

On March 21, 1995, in the Ingham County Circuit Court, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (6) on the bases of lack of jurisdiction and pendency of a prior proceeding. Following the hearing, the circuit court determined the jurisdiction was proper in Michigan and assumed jurisdiction over the children and the divorce proceeding. The court reserved for future decision the issue of jurisdiction over the parties' property.

Plaintiff also brought a jurisdictional challenge. The English court ruled on June 13, 1995, that jurisdiction was proper in England. Defendant then asked the Ingham Circuit Court to defer jurisdiction to the English Court on the basis of

forum non conveniens. After a hearing on August 7, 1995, the circuit court denied the motion and assumed jurisdiction over the parties' property.

Both suits proceeded. On October 27, 1995, a "decree absolute" of divorce was entered in the English court. This was followed by a seven-day trial in March 1996 in which plaintiff filed and answer claiming the "full range of financial ancillary relief available to a wife under the Matrimonial Causes Act [of] 1973."

Both sides presented expert witnesses who testified regarding the parties' assets and plaintiff's reasonable needs. On March 21, 1996, the English court issued a lengthy opinion in which it determined defendant's total net worth to be "about £400 million."

The court ruled that the reasonable needs or requirements of plaintiff, in light of her predivorce lifestyle and habits and the available assets, entitled her to £300,000 ($450,000) a year for life. However, the court held that, "In seeking to achieve justice [the court is] not limited to the reasonable annual expenditure of the wife . . . or to such other matters . . . described as constituting her 'reasonable requirements.'"

The court awarded the plaintiff a lump sum of £9 million ($13,500,000), the amount it felt necessary to achieve an equitable distribution. The plaintiff was also awarded the house in Okemos, Michigan, and its contents, the parties

agreed were worth approximately $1.5 million. She was awarded four paintings and her jewelry. The court also set child support in the amount of $95,400 a year for both children.

Defendant was awarded four automobiles and the balance of the marital estate. The English court expressly found that plaintiff was not entitled to a substantial share of defendant's family wealth. It was not a product of the marriage and had not been generated by the efforts of either party.

On March 29, 1996, defendant moved to stay or dismiss the Ingham Circuit Court proceedings, arguing that the English judgment was entitled to enforcement under the principle of comity and under the Uniform Foreign Money-Judgments Recognition Act, MCL 691.1151 *et seq*; MSA 27.955(1) *et seq*. At the hearing on April 8, 1996, he urged, also, that the present action was barred by res judicata.

The circuit court judge denied the motion, finding that the English judgment was not entitled to recognition under the UFMJRA or the principle of comity. He reasoned that the English system of law was repugnant to the public policy of Michigan, and the English decision violated plaintiff's "right to have a fair and equitable distribution of property. . . . "

On appeal, in a per curium opinion, the Court of Appeals reversed, concluding that the "entire judgment, including the property division as well as the child support

and lump-sum awards," should be enforced under the UFMJRA. 224 Mich App 146, 150; 568 NW2d 353 (1997).

With regard to whether the English law was repugnant to our public policy, the Court of Appeals explained:

> [I]t cannot reasonably be argued that plaintiff was denied due process because she was represented by counsel, given an opportunity to be heard, and presented evidence on her own behalf. Although the circuit court opined that the English judge was not impartial, a review of the lengthy opinion of the English judge fails to support a finding of bias. Further, had the issue of fault been raised, it would not have benefitted plaintiff, who admitted that her continuing infidelity was the cause of the marital breakdown. Consequently, no evidence that plaintiff was prejudiced by an unfair tribunal or proceeding is present. [224 Mich App 151-152]

> [T]he factors that judges take into consideration in property division in English divorce cases under § 25 of the Matrimonial Causes Act of 1973 are virtually identical to the factors identified by our Supreme Court in *Sparks* v *Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992) . . . . While the Ingham circuit judge might have awarded plaintiff more of the marital estate than did the English judge, that fact alone does not render the English judgment repugnant to the public policy of the state where the children are

> adequately provided for and the plaintiff has the means to maintain a lifestyle similar to the one she enjoyed throughout the greater part of the marriage. [*Id.* at 152.]

The Court of Appeals also concluded that comity mandated that the English judgment be respected. Plaintiff had a fair hearing on the merits at which she was present, represented by counsel, and actively participated. Thus, she was accorded due process.

Finally, the Court of Appeals reasoned that res judicata barred the case from being relitigated because the English court had considered the property, alimony, and child support claims and issued a final order. The English court did not consider child custody or visitation. These issues were within the purview of the Ingham Circuit Court under the Uniform Child Custody Jurisdiction Act, MCL 600.653; MSA 27A.653.

II. ANALYSIS

The Court of Appeals correctly held that comity dictated that the judgment should be enforced because the plaintiff was accorded due process. Since the English judgment adjudicated the property issue, the plaintiff is barred from relitigating that issue under res judicata.

> Comity is defined as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to

> international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. [*Bang* v *Park*, 116 Mich App 34, 39; 321 NW2d 831 (1982), citing 16 Am Jur 2d, Conflict of Laws, § 10, pp 27-29 (currently § 15, pp 25-26).]

Comity mandates that this foreign judgment be given force and effect. The seminal United States Supreme Court case of Hilton v Guyot, [2] set forth the factors that the federal courts use in recognizing and giving full effect to the judgment of foreign countries under comity:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this action should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as

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[2] 159 US 113, 202-203; 16 S Ct 139; 40 L Ed 95 (1895).

> on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Michigan courts have used the *Hilton* criteria. In *Growe* v *Growe*, [3] the appellee began a domestic relations action in Ontario. A judgment for alimony and custody of the parties' minor children was rendered by the Supreme Court of Ontario. Later, the defendant left Canada, obtained a Nevada divorce, and began living in Wayne County, Michigan. The appellee commenced suit in Wayne Circuit Court seeking support arrearages. The trial court dismissed the appellee's action, and the Court of Appeals, in reviewing the appellee's request for relief noted:

> Faced as we are here with a judgment from a court of competent jurisdiction which lies but the breadth of a river from the instant court, closer, indeed, than most of the remaining 49 States, and a court which draws its concepts of law from the same roots as ours, comity supplies a rational and well-founded reason for affording relief to this plaintiff. Any appellate court faced with the compelling elements this Court finds before it would be derelict if it did not examine minutely this burgeoning concept of jurisprudence. [2 Mich App 32.]

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[3] 2 Mich App 25; 138 NW2d 537 (1965),

In upholding the Ontario judgment under the principle of comity, the Court of Appeals held:

> A review of the judgment will indicate whether or not the basic rudiments of due process were followed, whether the parties were present in court, whether a hearing on the merits was had. [2 Mich App 33.]

Here, both the parties participated and were represented by counsel in the English court proceedings. Plaintiff initially challenged jurisdiction in the English court. She asserted that defendant had not been "habitually" a resident of England for twelve months. Justice Johnson of the Family Division of the High Court of Justice ruled in defendant's favor, concluding that England was his main home and that he intended to stay there.

Plaintiff argues that the English judgment should not be enforced because defendant was not domiciled in England. We find this argument unpersuasive. The present case is distinguishable from the situation presented in *Gray* v *Gray*, 320 Mich 49, 58; 30 NW2d 426 (1948). In *Gray*, the wife was not personally served with process and the husband lived in Nevada only for the time necessary to obtain a divorce, then returned to Michigan. Under those facts, we determined that he had not acquired a bona fide domicile in Nevada and refused to recognize the divorce. See also *Henry* v *Henry*, 362 Mich 85, 92-93; 106 NW2d 570 (1960). However, in the

present case, the record does not reflect that defendant moved to England for the purpose of obtaining a divorce. Rather, he moved to England to receive a disbursement from his family's trust.

The English Court heard evidence pertaining to the value of the Dart Container Corporation, as well as defendant's salary and other real and personal property. It heard evidence regarding plaintiff's nonmonetary contributions to the marriage as well. It considered the home in Michigan, paintings, jewelry, and cars.

The parties agree that the factors that the English courts examine when dividing property are substantially the same as those used in Michigan. In *Sparks* v *Sparks*, *supra*, this Court set forth the appropriate factors to consider in the division of marital property:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [Id. at 159-160.]

Section 25 of the Matrimonial Causes Act [4] requires that an English court consider nearly identical factors in

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[4] English Matrimonial Causes Act, 1973, § 25.

dividing marital property.

Plaintiff argues that English courts apply a different rationale in cases involving large assets. In her brief, she asserts that the English court principally examined her financial needs to determine the appropriate award, not the marital assets.

In *Preston* v *Preston*, [5] the English court announced a formula to be applied in cases in which the available resources are large. *Preston* established that there is a maximum sum to be awarded. This so-called "Preston ceiling" limits the award to an amount that satisfies the court's estimation of a wife's needs for support. Lord Justice Ormrod wrote in *Preston*:

> I think that on the true construction of § 25 there does come a point, in cases where the available resources are very large, . . . when the amount required to fulfill its terms "levels off," and redistribution of capital as such, in some unspecified ratio begins, which is outside the section. [*Id.* at 339]

Had the English Cour actually used this formulation to divide the parties' marital assets, we might agree with plaintiff that she was denied due process. However, the English court did not use the *Preston* ceiling. Instead, it determined that the defendant's holdings and trust income

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[5] 1981 2 FLR 331.

were not marital property. Justice Johnson explained:

> [I]f you have a case where the husband and wife together built up a vast property empire, I see no reason why the wife's contribution should not entitle her to 50%. There is said to be a distinction between the wife whose contribution was child care and the wife who actually worked in the business, doing the books or whatever, it was. If Mr. and Mrs. Dart had started with nothing and in a back street somewhere in Detroit they had started making plastic objects and over the period of 20 or 30 years they had [ended] up with an empire worth [£] 1,000 million, I would see every reason for Mrs. Dart having half of it. Personally, I do not have any difficulty with that. Whether the English law permits it or not is another matter, but that is not this case.

Normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution. *Lee* v *Lee*, 191 Mich App 73; 477 NW2d 429 (1991). The trust income from the Dart Container Corporation was never marital property. Although the defendant worked for Dart Container Corporation during the marriage, his compensation was the salary and bonuses that he earned. His cumulative salary and bonuses over the course of the marriage were far less than the $14.5 million property award that plaintiff

received.

The Dart fortune and defendant's interest in it exist independently of defendant's workplace activities or the marriage partnership. [6]

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[6] We recognize that, in certain situations, a spouse's separate assets, or the appreciation of their value during the marriage, may be included in the marital estate.

In *Hanaway* v *Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), the Court of Appeals held that the stock the defendant inherited in a family-owned company could be distributed as part of the property award. The plaintiff's handling of child-rearing and domestic duties had freed the defendant to concentrate on building the company and increasing the value of its stock. Similarly, in *Reeves* v *Reeves*, 226 Mich App 490; 575 NW2d 1 (1997), the Court of Appeals concluded that the marital estate did include the appreciation in value of the husband's separate assets that he actively managed during the marriage, but not the appreciation of his passive investments.

We agree with the rationales expressed in *Hanaway* and *Reeves*. However, we find the circumstances in those cases distinguishable from the present situation. We recognize the possibility that plaintiff might have shown a nexus between defendant's work at the company and the underlying trust assets. The object would have been to include within the marital estate the appreciation in value of the trust assets. However, we conclude that the possibility of prevailing was remote and, therefore, not a sufficient reason for us to decline to recognize the English judgment. Unlike the husband in *Reeves*, *supra*, defendant did not actively manage the trust in question. It was a legal entity separately created by defendant's father.

Thus, the English court's treatment of defendant's interests in the Dart family trusts and assets as separate property, rather than marital assets, did not violate plaintiff's right to due process.

Moreover, plaintiff's assertion that the English court failed to consider marital property is flawed. The English judgment awarded her the $1.5 million house in Okemos, some paintings, and a car. It also awarded child support in the amount of more than $90,00 a year. Certainly, the English court could not have divided these marital assets had there been no discovery. We find that the plaintiff was accorded due process in the English proceeding.

Consequently, res judicata bars the plaintiff from relitigating the property distribution issue. The English court decided this issue on the merits. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs* v *Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested is the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* at 375-376.

Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction

that the parties, exercising reasonable diligence, could have raised but did not. *Gose* v *Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague* v *Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

Here, the Michigan divorce action involves the same parties with the same assets and the same children as the English action. We have already determined under our comity analysis that the English judgment is valid. The fact that it does not address custody or visitation is not fatal to its preclusive effect with respect to property distribution. The Ingham Circuit Court has jurisdiction over the questions of custody and visitation, pursuant to the Uniform Child Custody Jurisdiction Act, *supra*. See *Braden* v *Braden*, 217 Mich App 331, 338-339; 551 NW2d 467 (1996). Accordingly, res judicata bars relitigation of the present action.

III. CONCLUSION

We affirm the Court of Appeals decision to give deference to the English divorce judgment under the principle of comity. It was evident from the judgment rendered in England that plaintiff had a fair hearing on the merits, that she was present, represented by counsel, and actively participated. Thus, the present action is barred by res judicata.

/s/ Marilyn Kelly
/s/ Elizabeth A. Weaver
/s/ Clifford W. Taylor
/s/ Robert P. Young
/s/ Maura D. Corrigan

CAVANAGH, J. (dissenting).

I must part company with the majority on the deference shown to the English Court's judgment. While I agree with Justice Kelly that the English Court did not apply the Preston [1] "ceiling" rule in this case, but rather steered away from such a ruling to find the bulk of defendant's assets to be nonmarital property, I am unpersuaded that such a finding removes the English decision from the looming shadow of *Preston*.

As even the majority tacitly admits, the application of the *Preston* rule in a case such as this (or in any case for that matter) would likely raise serious due process concerns. The mere existence of such a rule, and the apparent statutory basis for the rule cited by Lord Justice Ormrod in adopting it, [2] suggests that, at least in cases in which substantial assets are involved, the goals of the English judicial system in marital dissolution cases differ substantially from the framework of our state, as reviewed by us in *Sparks*. [3] Where plaintiff was in the exact position necessary for her to suffer the ill effects not only of the *Preston* rule, but also the underlying statutory and judicial rationales for it, I cannot say, particularly in view

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[1] *Preston* v *Preston*, 1981 2 FLR 331.

[2] *See Preston* at 339.

[3] *Sparks* v *Sparks*, 440 Mich 141; 485 NW2d 893 (1992).

of the asset division undertaken by the English Court, that she escaped unscathed by the effects of the adverse predispositions demonstrated.

In reaching this conclusion, it is necessary to consider, given the majority's reliance on the determination of the trust assets as nonmarital in nature, what sort of effect would have occurred had Justice Johnson of the English Court found the entire amount of disputed property (including the trust assets) to consist of marital assets. While the justice postulated he personally would not have had difficulty awarding plaintiff half the assets in such a case, he also noted that whether that would be permitted under law was another matter. Indeed, the *Preston* rule would appear to dictate that, regardless of his decision, plaintiff, from the beginning of the English case, was predestined to receive only a fraction of the disputed assets, regardless of the determinations of the Court on whatever substantive issues there might have been (including the marital property issue). It is difficult to give due process credence to a system in which the result would remain adverse to the plaintiff whether or not she prevailed on the point the majority determines the case should be decided upon.

Accordingly, while not, in large part, disputing the authorities cited by the majority as a general matter. I am nonetheless convinced that the operation of the English system of marital asset division in cases involving substantial

assets reflects considerations very different from our own, and that such considerations cast a shadow on the decision sufficient to preclude Michigan courts, with our well-established criteria for property distribution in divorce cases, from recognizing a decision that is not only from another land, but truly foreign to the concepts underlying Michigan law. Accordingly, I respectfully dissent from the Court's decision.

/s/ Michael F. Cavanagh

/s/ James H. Brickley

Order

Entered: July 20, 1999

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

James H. Brickely
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

110361

KATINA ESTELLE DART,

Plaintiff-Appellant,

v

SC: 110361
COA: 193786
LC: 95-085248-DM

ROBERT CHARLES DART,

Defendant-Appellee.

This cause having been brought to this Court by appeal from the decision of the Court of Appeal and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is AFFIRMED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 20, 1999 /s/ Corbin R. Davis
Clerk

Order

Entered: September 14, 1999

Michigan Supreme Court
Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice
James H. Brickely
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

Rehearing No. 439

110361

KATINA ESTELLE DART,

Plaintiff-Appellant,

v

ROBERT CHARLES DART,

Defendant-Appellee.

SC: 110361
COA: 193786
LC: 95-085248-DM

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

Cavanagh, J., would grant rehearing.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 14, 1999 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

KATINA ESTELLE DART

Plaintiff-Appellee,

v

ROBERT CHARLES DART,

Defendant-Appellant.

FOR PUBLICATION
June 10, 1997
9:25 a.m.

No. 193786
Ingham Circuit Court
LC No. 95-085248-DM

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying his motion to stay the proceedings or dismiss this divorce action filed by plaintiff. We reverse.

Plaintiff and defendant were married in 1980 and were residents of Okemos, Michigan, until 1993, when they moved to England. The parties had two children, William Charles Dart, born January 23, 1983, and Arianna Constance Dart, born November 12, 1985. Defendant is the son of the founder of Dart Container Corporation, one of the largest family-

controlled businesses in the United States. The move to England made possible a September 1993 transfer of several hundred million dollars to defendant from family trusts. For the transfer to occur, defendant had to renounce his United States citizenship.

The parties jointly purchased a house near London and enrolled the children in school. The marriage eventually floundered, and defendant filed for divorce in England on February 3, 1995. Plaintiff, through her attorneys, filed a similar suit in Michigan in Ingham Circuit Court four days later. [1] The parties remained in England until a consent order was entered in the English court on June 9, 1995, allowing plaintiff to return with the two children to Michigan.

On March 21, 1995, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (6) in Ingham Circuit Court based on lack of jurisdiction and pendency of a prior proceeding. Following a hearing on the matter, the circuit court determined that jurisdiction was proper in Michigan and assumed jurisdiction over the two children and the divorce proceeding. The court reserved the issue of jurisdiction over the parties' property.

Plaintiff also brought a jurisdictional challenge in the English court. The English court determined that jurisdiction was proper in England in a judgment entered on June 13, 1995. Following entry of this order, defendant moved the Ingham Circuit Court to defer jurisdiction on the basis of

forum non conveniens. After a hearing on August 8, 1995, the circuit court denied the motion and assumed jurisdiction over the parties' property.

Both suits proceeded. On October 27, 1995, a "decree absolute" of divorce was entered in the English court. This was followed by a seven-day trial in March 1996 in which plaintiff filed an answer claiming the "full range of financial ancillary relief available to a wife under the Matrimonial Causes Act [of] 1973." Both sides presented expert witnesses who testified regarding the parties' assets and plaintiff's reasonable needs. On March 21, 1996, the English court issued a lengthy opinion in which it determined defendant's total net worth to be "about £400 million."[2] The court awarded plaintiff approximately $14.3 million and the house in Okemos and its contents, which the parties agreed were worth approximately $1.5 million. Plaintiff was also awarded four paintings and her jewelry. The court also awarded child support in the amount of $95,400 per year for both children. Defendant was awarded four automobiles and the balance of the marital estate.

On March 29, 1996, defendant moved to stay or dismiss the Ingham Circuit Court proceedings, arguing that the English judgment was entitled to enforcement under the Uniform Foreign Money Judgments Recognition Act, MCL 691.1151 *et seq.*; MSA 27.955(1) *et seq.*, and the principle of comity. Defendant also argued at the hearing on April 8,

1996, that the English judgment was entitled to res judicata affect. The circuit court denied the motion, finding that the English judgment was not entitled to recognition under the UFMJRA or the principle of comity because the English system of law was repugnant to the public policy of Michigan and because the English decision violated plaintiff's "right to have a fair and equitable distribution of property." Defendant's application for leave to appeal the circuit court decision was granted by this Court on April 10, 1996.

I

Defendant first claims that the Ingham Circuit Court erred in determining that the provisions of the English judgment were not enforceable under the UFMJRA, which states that, except as provided in MCL 691.1154; MSA 27.955(4), "a foreign judgment is conclusive between the parties *to the extent that it grants or denies recovery of a sum of money.* The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit (emphasis added)." MCL 691.1153; MSA 27.955(3). In 1987, the definition of "foreign judgment" in the act was amended to expressly include judgments for support in divorce or child custody matters. 1987 PA 98, § 1, codified at MCL 691.1151; MSA 27.955(1).[3] The scope of this amended definition is a matter of first impression. Defendant argues that the entire

judgment, including the property division as well as the child support and lump sum awards, falls within the ambit of the amended definition and should be enforced pursuant to the UFMJRA.

To the extent that the English judgment awarded sums certain to plaintiff, specifically the lump sum award and child support, the judgment is conclusive under § 691.1153 regardless of whether the lump sum was part of the property division. Therefore, the provisions of the English judgment relating to payment of sums certain are enforceable under the UFMJRA and the trial court erred in refusing to recognize the applicability of the statute.[4]

Plaintiff argues that the Ingham Circuit Court correctly held that the judgment need not be recognized under the UFMJRA because the English system is repugnant to the public policy of this state due to its treatment of women as "second-class citizens," its provision for only limited discovery, its failure to take the wife's contribution to the family into account, and its failure to try the issue of fault. MCL 691.1154(1)(a); MSA 27.955(4)(1)(a). A foreign judgment is not conclusive if it was rendered under a system which does not provide impartial tribunals or procedures compatible with due process of law. Here, however, it cannot reasonably be argued that plaintiff was denied due process because she was represented by counsel, given an opportunity

to be heard, and presented evidence on her own behalf. Although the circuit court opined that the English judge was not impartial, a review of the lengthy opinion of the English judge fails to support a finding of impartiality. Further, had the issue of fault been raised, it would not have benefitted plaintiff, who admitted that her continuing infidelity was the cause of the marital breakdown. Consequently, no evidence that plaintiff was prejudiced by an unfair tribunal or proceeding is present.

MCL 691.1154(2)(c); MSA 27.955(4)(2)(c) provides that a foreign judgment need not be recognized if the cause of action on which the judgment is based is repugnant to the public policy of this state, which is fixed by constitution, statute, and case law. *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 59; 554 NW2d 17 (1996). However, the factors that judges take into consideration in property division in English divorce cases under § 25 of the Matrimonial Causes Act of 1973 are virtually identical to the factors identified by our Supreme Court in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).[5] That different outcomes might obtain under virtually identical standards is a result of the exercise of the individual judge's discretion. While the Ingham circuit judge might have awarded plaintiff more of the marital estate than did the English judge, that fact alone does not render the English judgment repugnant to the public policy of the state where the

children are adequately provided for and plaintiff has the means to maintain a similar lifestyle to the one she enjoyed throughout the greater part of the marriage. *Bessmertnaja v Schwager*, 191 Mich App 151, 156-157; 477 NW2d 126 (1991) (declining to recognize a Swedish paternity judgment that failed to order support for an illegitimate child).

Lastly, plaintiff argues that the English judgment is not a final judgment because under English law, "all orders made in matrimonial proceedings concerning financial provision are interlocutory and not final." However, MCL 691.1153; MSA 27.955(3) disposes of this argument because it expressly states that the UFMJRA applies to "any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." The language cited by plaintiff refers only to "orders . . . concerning financial support;" it undoubtedly means that the orders for child support and alimony are subject to subsequent modification, just as orders for child support and alimony are in this country. See MCL 552.603; MSA 25.164(3). The fact that such judgments are subject to modification does not affect their finality for purposes of the UFMJRA. See § 552.603(2); *Langford v Langford*, 196 Mich App 297, 299; 492 NW2d 524 (1992). Further, looking to English law to determine

the finality of the English judgment, see *Growe v Growe*, 2 Mich App 25, 33-35; 138 NW2d 537 (1965), according to *Halsbury's Laws of England*, "a judgment or order which determines the principal matter in question is termed 'final.' . . . A final order is none the less final by reason that it is subject to appeal, and a judgment may be final even though it directs inquiries, or deals with costs only, or is made on an interlocutory application, or reserves liberty to apply." 26 *Halsbury's Laws of England*, 4th ed, § 505 (1979). Consequently, the English judgment is a final order. [6]

II

Defendant next contends that the Ingham Circuit Court erred by failing to dismiss this action based on the principle of comity. The circuit court determined that the rudiments of due process had not been met and that the result reached in the English judgment was contrary to the public policy of this state. A trial court's ruling on a motion for dismissal is reviewed for clear error. *Hoffman v Garden City Hospital*, 115 Mich App 773, 779-780; 321 NW2d 810 (1982). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Richmond Twp v Erbes*, 195 Mich App 210, 224; 489 NW2d 504 (1992).

Comity is a recognition of a judicial or legislative act

of another nation that permits foreign judgments to be recognized in this country. *Bang v Park*, 116 Mich App 34, 39; 321 NW2d 831 (1982). In *Growe*, this Court held that a Canadian alimony judgment could be enforced in Michigan under principles of comity, stating:

> Faced as we are with a judgment from a court of competent jurisdiction which lies but the breadth of a river from the instant court, closer, indeed, than most of the remaining 49 states, and a court which draws its concepts of law from the same roots as ours, comity supplies a rational and well-founded reason for affording relief to this plaintiff. Any appellate court faced with the compelling elements this Court finds before it would be derelict if it did not examine minutely this burgeoning concept of jurisprudence. [*Id.* at 32; see also *Bang v Park*, *supra* at 38-39.]

In *Growe*, this Court indicated that the factors to be considered in determining whether a foreign judgment should be accorded comity were "whether or not the basic rudiments of due process were followed, whether the parties were present in court, [and] whether a hearing on the merits was held." 2 Mich App at 33. The *Growe* decision was held to represent prevailing Michigan law in *Bang*, *supra* at 40.

Contrary to the Ingham Circuit Court's findings, it is

evident from the judgment rendered in England that plaintiff had a fair hearing on the merits at which she was present, represented by counsel, and actively participated. Therefore, to the extent that the property distribution provisions of the English judgment are not encompassed by the UFMJRA, the decision is entitled to enforcement under the principle of comity because there is no evidence that it is contrary to the public policy of this state. [7]

Plaintiff also contends, once again, that "under English law all orders made in matrimonial proceedings concerning financial provision are interlocutory and not final." For the reasons above, we reject this argument with respect to comity as well.

III

Defendant lastly contends that plaintiff's suit is barred by res judicata. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first; and (3) both actions involve the same parties or their privies. *Id.* at 375-376. Michigan has adopted a broad application of the doctrine of res judicata,

barring not only claims actually litigated in the prior action, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Sprague* v *Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

Here, the Michigan action involves a divorce between the same parties with the same assets and the same children. Therefore, res judicata applies if the judgment is final and enforceable. Plaintiff raises two arguments: first, that the judgment was not entitled to be pleaded as res judicata because it was not final, and second, that the judgment is not preclusive because it does not address issues such as custody, visitation, pension rights, dower rights, or insurance or tax liabilities.

We have already determined that the English judgment is a final order. Further, the fact that the judgment does not address custody or visitation is not fatal to its preclusive effect. The Ingham Circuit Court has jurisdiction over custody and visitation pursuant to the Uniform Child Custody Jurisdiction Act, MCL 600.653; MSA 27A.653. See *Braden v Braden*, 217 Mich App 331, 338-339; 551 NW2d 467 (1996). With regard to the other items referred to by plaintiff,[8] res judicata applies as a bar to every claim arising out of the same transaction that the parties, exercising

reasonable diligence, could have raised but did not. *Gose, supra*, 409 Mich 160-163. Because these issues could have been raised before the English court, plaintiff's suit is barred by res judicata.

Reversed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] Jurisdiction based on domicile and residence in Michigan is not an issue raised in this appeal.

[2] The exchange rate is approximately $1.59 to £1.

[3] Before this amendment, foreign judgments providing for alimony or child support could be enforced under the principle of comity. See discussion of Issue II, *infra*.

[4] With regard to the property distribution provisions of the judgment, see Issue II.

[5] Pursuant to *Sparks*, these factors include the duration of the marriage, the contributions of the parties to the marital estate, the age and health of the parties, the life status of the parties, including their respective necessities and circumstances, the parties' respective earning abilities, their past relations and conduct, and general principles of equity. Under the Matrimonial Clauses Act of 1973 § 25(20, the court is directed to consider the parties' income, earning capacity, and financial resources, financial needs and obligations, standard of living, age and duration of the

marriage, physical or mental disabilities, contributions to the welfare of the family, and conduct.

[6] This is consistent with Michigan law, which provides that property settlement provisions of a divorce judgment are final and, as a general rule, cannot be modified. *Colestock* v *Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984). Additionally, the English Judgment has been affirmed on appeal.

[7] See Issue I.

[8] That is, pension rights, dower rights, or insurance or tax liabilities.

Court of Appeals, State of Michigan

ORDER

Richard A. Bandstra
Presiding Judge

Katina Estelle Dart v Robert Charles Dart

Docket # 193786

L.C. # 95-085248-DM

Richard Allen Griffin
E. Thomas Fitzgerald
Judges

This Court issued an opinion on June 10, 1997, that contained a clerical error.

On the Court's own motion, the Court orders that the opinion is AMENDED on page 3, 1st paragraph, line 11 with the word "impartiality" being replaced by "**bias**," and shall fully read as follows:

"Although the circuit court opined that the English judge was not impartial, a review of the lengthy opinion of the English Judge fails to support a finding of **bias**."

In all other respects, the opinion remains unchanged.

A true copy entered and certified by Ella Williams, Chief Clerk, on .

JUN 26 1997
Date

/s/ Ella Williams
Chief Clerk

Court of Appeals, State of Michigan

ORDER

Richard A. Bandstra
Presiding Judge

Katina Estelle Dart v Robert Charles Dart

Docket # 193786

Richard Allen Griffin
E. Thomas Fitzgerald
Judges

L.C. # 95-085248-DM

The Court orders that plaintiff/appellee's motion for rehearing is denied.

A true copy entered and certified by Ella Williams, Chief Clerk, on

AUG 01 1997
Date

/s/ Ella Williams
Chief Clerk

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in

such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisionsof this article.

691.1151 Definitions.

Sec. 1.

As used in this act:

(a) "Foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama canal zone, the trust territory of the Pacific islands or the Ryukyu islands.

(b) "Foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, including a judgment for support in matrimonial or family matters, but not including a judgment for taxes, a fine or other penalty.

691.1152 Applicability of act; final, conclusive, enforceable judgments; appeal.

Sec. 2.

This act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

691.1153 Conclusiveness of foreign judgment; enforceability.

Sec. 3.

Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

691.1154 Inconclusiveness of foreign judgment; nonrecognizable judgments.

Sec. 4. (1) A foreign judgm nt is not conclusive if:

(a) The judgment was ren .ered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.

(b) The foreign court did not have personal jurisdiction over the defendant.

(c) The foreign court did not have jurisdiction over the subject matter.

(2) A foreign judgment need not be recognized if:

(a) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend.

(b) The judgment was obtained by fraud.

(c) The cause of action on which the judgment is based is repugnant to the public policy of this state.

(d) The judgment conflicts with another final and conclusive judgment.

(e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.

(f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

691.1155 Basis for jurisdiction.

Sec. 5. (1) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if:

(a) The defendant was served personally in the foreign state.

(b) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him.

(c) The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.

(d) The defendant was domiciled in the foreign state when the

proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state.

(e) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state.

(f) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(2) The courts of this state may recognize other bases of jurisdiction.

691.1156 Appeal; stay of proceedings until determination. Sec. 6.

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

691.1157 Recognition of judgments not covered by act.

Sec. 7.

This act does not prevent the recognition of a foreign judgment in situations not covered by this act.

691.1158 Construction of act.

Sec. 8.

This act shall also be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

691.1159 Short title.

Sec. 9.

This act shall be known and may be cited as the "uniform foreign money-judgments recognition act".

552.19 Restoration of real and personal estate to parties.
Sec. 19.

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION No. 766 of 1995

Royal Courts of Justice

Friday, 21st March 1996

Before:

MR. JUSTICE JOHNSON

(In Chambers)

BETWEEN:

DART Petitioner

- and -

DART Respondent

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MR. B. SINGLETON, Q.C. and MR. L. MARKS (instructed by Messrs. Lee & Pembertons) appeared on behalf of Petitioner.

MR. J. MUNBY, Q.C. and MISS C. WILLBOURNE (instructed by Ms. Margaret Bennett) appeared on behalf of Respondent.

JUDGMENT

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DISCUSSION AFTER JUDGMENT	42

MR. JUSTICE JOHNSON: This case requires the court to consider the exercise of its financial jurisdiction under the Matrimonial Causes Act 1973, as amended, and in particular the performance of the duties imposed on the court by s. 25 where resources available are substantial.

The assets available to the family are of the order £400 million. The wife puts her reasonable needs at about £3 million per annum and capitalized that requirement at £119 million which with her suggested need for capital expenditure of about £3 million and the house which she presently owns, worth £1 million, together constitutes a claim for about £123 million.

In response the husband has made an open offer worth to the wife about £10 million in addition to her house.

The task of the court was described by Wood J. in Page v. Page [1981] 2 F.L.R. 198 at p. 206:

> "The possible permutations and combinations of fact are infinite. In every case, therefore, it is to the basic principles set out in s25 itself that a court must turn. It must apply those principles and by balancing the weight to be given to each relevant factor exercise its discretion to do that which it believes to be justice between the parties before it. When considering redistribution of capital, a court errs if it starts by looking for a fraction; first because this forms no part

of the guidelines in s25 and, secondly, because to do so thereby fetters the very wide discretion which the court is bidden to exercise, in order to do justice between the parties.

"The ultimate aim is quite clear. It is to do that which is fair, just and re3asonable between the parties in rearranging the family finances, by applying the general provisions of s25 together with those specific factors which are relevant to the particular case."

The History of the Marriage

The wife is 38, the husband 37. The grew up in the State of Michigan and married there on 25th October 1980. They have two children, a boy of 13 and a girl of 10. The family live in Michigan and in September 1989 moved to a house at Okemos which is a small town near Lancing and not too distant from Detroit. In August 1993 the family moved to London. There were several reasons for this move but principle amongst them were several reasons for this move by principle amongst them was the financial advantage to the family of doing so.

The husband is a son of the founder of a major United States manufacturing corporation which is now among the largest family controlled business in the United States. Departure from the United States provided the opportunity for transfer from family trusts to the husband of very substantial assets. It was necessary for the husband to renounce his

United States citizenship. The family moved to London in August 1993 and initially lived in a prestigious hotel and then in substantial rented accommodation whilst a house Kensington was made ready. The house was bought in joint names for £2.75 million and refurbishment and redecoration cost a further £3.50 million. The children started school in London and the family began to settle into English life. The wife had thoughts of buying a substantial house in Cotswold. However the relationship between the husband and wife deteriorated and in February 1995 both filed petitions for divorce. The husband's petition was filed in England on 3rd February 1995; the wife's in Michigan on 7th February 1995.

An immediate practical issue that required resolution was where the children should live and with whom. the father intended to continue to live in England, the mother wised to return to Michigan. This question fell to be determined by the English court because if the children were to live with their mother in Michigan it would be necessary for her to have the leave of the English court to remove the children permanently from the English jurisdiction. In the event this issue was resolved by consent. On 9th June 1995 an order was made the effect of which was that the children's home should be with the mother in Michigan and they moved there with her shortly thereafter.

As between the husband and wife, the major remaining issue was whether their divorce and consequential financial matters should be dealt with here or in Michigan. The wife challenged the jurisdiction of the English court, asserting that the husband had not been habitually resident in England and Wales for the necessary period of one year prior to the filing of his petition. In the alternative she asked the English court to stay the husband's petition under the Domicile and Matrimonial Proceedings Act 1973. In a judgment which I gave on 13th June 1995 I held that the husband had been habitually resident here for the necessary period. As to the application for a stay I said:

> "It seems to me that the English court is more appropriate, but certainly the contentions on behalf of the wife seem to me to fall short of the test propounded by Lord Goeff (in De Dampierre v. De Dampierre [1988] A.C. 92)".

The wife's application for leave to appeal against these rulings was refused by the Court of Appeal on 20th July 1995.

The husband's divorce petition then resulted in an uncontested hearing on 27th July 1995 when a decree nisi was pronounced. The wife attempted to delay the making of the decree absolute but this was made on 27th October 1995 and her application for leave to appeal against the making of the decree absolute was refused by the Court of Appeal.

The History of the Husband's Wealth

The wealth of the husband's family was created by his father. The husband's parents lived comfortably but prudently. The life style of the family was certainly not miserly or modest but equally was certainly not extravagant. After the marriage the husband and wife followed the same pattern. The house which they had built in Okemos stood in 39 acres of parkland, ponds and woodland. It is perhaps the most impressive of the houses in the locality. it is presently worth £1 million. Nonetheless the husband and wife adhered to the life style of the husband's own family. In recent proceedings in Michigan the wife said: "I am the only one that is leading my kind of life in Okemos. The husband's salary from the family corporation was really little more than one would have expected for a senior executive and, in the financial context of this case, their expenditure was moderate. In the four years 1990 to 1993 I find that their expenditure was £238,317; £209,305; £348,406 and £407,528.

The distribution to the husband in September 1993 included a substantial amount of Brazilian government debt. In March 1994 the husband sold this speculative investment to one of his brothers in return for two loan notes. I find that the gross sum payable to the husband under these notes was $734,769,122. The agreement for this transaction dated 8th March 1994 involved also certain liabilities. I hold that accordingly the net value to the husband of the two loan notes

was $438,680,929.

These loan notes provide for repayment to the husband by his brother by a series of instalments ending in the year 2005. In assessing the husband's present wealth it is necessary to take some account of this deferral and also of the possibility that because of the brothers substantial investment in Brazilian government debt it might in practice be necessary for the repayments to be further deferred. However this has not seemed to me to be a matter of significance in the financial context of this case.

The Husband's Present Wealth

Ignoring items which for my purpose are not material, the husband's wealth is of two kinds.

He has assets which I hold, on the basis of their being realized over a sensible period, are worth about £274 million.

The husband is a discretionary beneficiary of two trusts the assets of which are a 50% holding in a major corporation and associated businesses of the husband's family. The net book value of the assets in these trusts is about $193 million. Given the nature of the assets, it is clearly impossible to make an accurate assessment of their value but I accept that their market value is, as the husband says, "arguably higher".

As to the likelihood of further distributions to the husband from the trust, I accept his evidence that this is

unlikely. I accept his evidence that her purpose "was, and is, to retain the business as a cohesive unit independent form the individual members of the family and therefore protected from the vagaries of personal ambition or misfortune.

I understand it to be the intention of my father and the trust that the business will be retained within the family and controlled by successive generations."

In total therefore, and assuming for my purpose that the assets held in the discretionary trust are to be regarded as available to the husband, in total his net worth is about £400 million.

On behalf of the wife it was contended that his net worth is between £489 million and £640 million. The latter figure is arrived at largely by leaving out of account the liabilities which were assumed by the husband under the loan note agreement of 8th March 1994 and this omission I hold to be not justified. The figure of £489 million does not involve any discount for the deferred payments of the loans and there are other issues which were raised between counsel and between the accountants which it is unnecessary to describe in detail. Clearly for the purpose of the balancing exercise with which I am concerned the issue is immaterial but if it were, then I would unhesitatingly prefer the computation on behalf of the husband..

The Husband's Income

For the three years down to and including 1994, the husband's returns to the United States Inland Revenue Service show incomes of $48,243,463; $886,708,093; $37,167,438. However these figures are little more than theoretical because they represent income which, whilst attributable to the husband, is in practice not available to him because of the policy within the family of accumulating income from reinvestment in the businesses of the corporation. Whilst bear these figures in mind, it has seemed to me that I should place greater emphasis upon the expenditure of the family as an indicator of the standard of living of the family and what is appropriate for the wife in the future.

Since the family moved to London in 1993 the husband has had additional income which has been taxable in the United Kingdom. The last available figure is for the tax year 1994.1995 when his taxable income here was about £190,000.

The husband's accountant produced a schedule showing the husband's income and benefits from his employment with the corporation but leaving out of account income from trusts and other unearned income. For the three years mentioned above the earnings were $313,009; $563,917 and $281.548.

It has been suggested on behalf of the wife that the husband had received benefits from the corporation over and above those which had been disclosed to the United States revenue. The suggestion was that expenses incurred by him had been met by the corporation. I reject this suggestion. I accept the evidence of the husband's accountant, Mr. Freeman, from his very extensive examination of the husband's affairs and of his financial relationship with the corporation, that the culture was one of meticulous accounting. Simply by way of illustration of this point I refer to a manuscript document in which the husband was submitting a claim to the corporation for expenses and gave credit for two items of postage of $3.33 and $2.08. In the words of Mr. Freeman:

> "The principal culture of the organization is that financial information is diligently and accurately recorded and that personal expenditure is carefully recorded and accounted for."

The Wife's Capital

The only asset for me to take into account is the house in Okemos and its contents. The house is agreed to be worth about £1 million sterling.

The wife has a half interest in the house in London and a small number of shares in the husband's family corporation.. Those I intend to transfer to the husband or to

his order and so I leave them out of account. The wife has jewellery worth perhaps rather more than £200,000 and that I propose to leave out of the account.

The wife has incurred costs in these proceedings of £1,336,400 of which all but £30,000 remain unpaid. No doubt she has further costs in the proceedings which she has continued in Michigan.

The Wife's Contribution

The marriage lasted 14 years and during that time I find the wife to have been a good wife and a good mother. Moreover because of her professional training she was able to make a particular contribution in the design of the homes in Okemos and London, and in their refurbishment and decoration.

In this regard a telling metaphor was used by a former President, Sir Jocelyn Simon:

> "The cock can feather a nest because he does not have to spend most of his time sitting on it."

(See 1970 A.C. 777 at p. 811). He developed the point on a further occasion saying:

> "In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to

perform his, she is in justice entitled to share in its fruits."

Here the wife's contribution to the family was substantial but neither she, nor indeed the husband, made a significant contribution to the present wealth of the family. The wealth that exists because of the enterprise and industry of the husband's father.

I see every reason why in the kind of situation envisaged by the President, a wife should share in the fruit of her husband's economic activities during their marriage, I see no reason why, as a matter of justice or equity, a wife should be entitled on the basis of her contribution to the marriage to share in the fruits of the enterprise and endeavor of her husband's father.

Preparation of the Case

The extravagance of the preparation in this case defies moderate description. The husband's initial disclosure was in my view adequate, I would say more than adequate, for the purpose of these English proceedings. Nonetheless on the wife's behalf repeated requests were made for yet further information and yet further documents. the result is that there have been in court an astonishing 72 ring binders all of substantial size. The wife's repeated questions and demands for information were aimed at challenging the husband's present wealth and the various routes by which it came to him; and the past expenditure of the family. The information

and documents which were provided by the husband were provided voluntarily and the court was never asked to adjudicate on the justification for the wife's demands. No doubt the husband was advise that to make an issue about the matter would create delay and perhaps even more expense; and that in any event the information might have to be forthcoming in proceedings in the United States.

Be that as it may the consequence has been that the wife's legal costs in the various English proceedings have been a staggering £1,336,400 of which £877,025 is attributable to this application.

The responsibility for this extravagant, and indeed scandalous, waste of money does not, I suspect, lie with the wife's English lawyers but rather with her attorneys in the United States. I not from the bundle of correspondence that when an open offer of settlement was made on behalf of the husband, the wife's solicitors made no effective response but asked only that any proposal for settlement should be directed by the husband's English solicitors to the wife's attorneys in Michigan.

The Accountants

Each side instructed an accountant. Mr. Freeman instructed on behalf of the husband and Mr. Cendrowski on behalf of the wife are clearly highly experienced and of unquestionable integrity. Mr. Freeman has comparatively

little experience of matrimonial litigation of this kind but he is plainly an accountant of sound judgment. His very considerable enquiries into the husband's affairs led him to produce a budget based largely but by no means only on his assessment of the past expenditure of the family. His budget was indeed criticized by counsel on behalf of the wife as being more than an exercise based on past expenditure. From his written reports and from his evidence in the witness box I became increasingly convinced that Mr. Freeman had set about his task with the kind of objectivity expected of an expert and spoken of by Mr. Justice Thorpe in F v. F [1995] 2 F.L.R. 45.

Mr. Cendrowski has much greater experience of preparing budgets in matrimonial proceedings but from his written , and particularly from his oral, evidence it became increasingly clear to me that he had approached his task in too partisan a manner and had set himself, or more probably had had set for him, the task of arriving at as big a figure as was sustainable. Whilst some of Mr. Freeman's original figures seemed to me to be on the low side, that was the result of his approaching the matter on the basis of past expenditure rather than from any intention to advocate the husband's case. On the other hand some of the figures advanced by Mr. Cendrowski were totally removed from reality, either in the past or on any reasonable forecast for the future.

Whilst in respect of many items in the budget I did not find myself in complete agreement with Mr. Freeman, I preferred his evidence and opinion to those of mr. Cendrowski.

The Wife's Needs

I was faced with two budgets for the wife's reasonable annual expenditure; that of Mr. Cendrowski for £3,146,541 per annum and that of Mr. Freeman for £278,000 per annum. the figures in both budgets, in their revised forms, are for only the expenditure of the wife and not for direct expenditure on the children. It would be wearisome to rehearse in this judgment my comments on each of the 205 items in the budgets but during the course of the hearing I have made innumerable calculations and adjustments.

It was rightly submitted on behalf of the wife that in considering a budget of this kind a judge should guard against the danger of approaching a particular item of expenditure from his own personal experience. However judges in the Family Division have experience gained over many years both a the Bar and on the Bench of expenditure of those with very substantial resources. I have approached the opposing budgets in the light of that experience but also in the light of the evidence available to me of the past expenditure of this particular family, which as Mr. Justice Thorpe pointed out in

F v. F:

> "is the yardstick against which the wife's needs must be measured".

Mr. Cendrowski's figure for clothing and jewellery is £231,840. I regard that as excessive in the circumstances of this family and in the future circumstances of this wife. Equally I regarded Mr. Freeman's figure of £40,000 as tool low but I accept his revised figure of £55,000.

Mr. Cendrowski's figure for holidays is £506,000. Here it seemed to me Mr. Freeman's figure of £42,000 was more appropriate.

In relation to holidays the wife's budget provided for £150,000 as the cost of the occasional charter of a private aeroplane for travel to the holiday destination. During the marriage the family had the occasional use of one of the corporation's aeroplanes but this use was always charged to the husband. However this was not the habitual means of travel of the family even in the closing years of the marriage. This item does not seem to me to constitute a reasonable need for the wife in the future, although as I shall related, I propose to provide for her an additional sum to meet uncovenanted items and of course these budgets are no more than a tool for assessing the reasonable requirements of a wife. it is certainly not to be expected that she will spend the money in the same way that it has been assessed.

The wife's budget includes an item of £129,333 for gifts to charity and to her family, particularly to her parents. I regard this item as excessive. As to her parents, I was not persuaded that they were so in need of support that I should properly make provision for them in her budget.

The wife's budget included £185,333 for professional advice from attorneys, accountants and investment advisors. The suggestion was that the wife would need to spend £56,000 on attorneys to fend of claims being made against he and to guide her in her affairs. I do not regard that as reasonable. In my view, Mr. Freeman's figure of £9,200 for lawyers and accountants is rather low but much nearer the mark. It did not seem to me that I should take account of any provision for investment advisors because in the Duxbury and other calculations which I have made, I have sought to have regard to income net of investment fees.

Mr. Cendrowski's figure of £28,400 per annum for telephone I thought absurd.

Security

For most of the marriage the family was not protected by security guards but in about May 1994 arrangements were made for the family to be guarded by security staff engaged by the corporation. The wife told me that she resented this because the guards were engaged by the corporation and she felt that they were perhaps watching her on behalf of the

husband. This was certainly a factor but I find that she found the arrangements irksome for very understandable reasons. Wherever she went, whether it was shopping or anywhere else, she was accompanied by one or perhaps two of the guards. If the security was to be effective then it had to be complete and had to involve not only the husband and the wife by the children too. The mother's natural resentment of the security arrangements is nicely illustrated by an occasion when their son was to go abroad on a school trip and there was an issue between the husband and wife as to whether he should be accompanied by one of the guards. in the vent the wife's view prevailed and the boy went on the trip unguarded.

Whether the wife's reasonable needs include the provision of security for herself and for the children is an important issue in this application because, of the wife's suggested needs of £3,146,541, no less than £1,182,867 is attributable to security and indeed the actual figure would be somewhat higher because this item in the wife's budget does not include food and accommodation costs for the guards.

I have not found this any easy issue to resolve. In my experience of cases such as this, some families have guards and others do not. There is much to be said in support of the wife's proposal. the house in which she and the children live in Michigan is isolated and the husband and his brother's family all have guards. However for most of the marriage the husband and wife did not have guards and from my

impression of the wife's attitude to guards in the past and *from the manner in which she responded* to questions about having guards in the future, I became increasingly convinced that the wife had no intention of having this kind of security arrangement and that it was included in here budget simply as a device for enlarging her claim.. I hold that provision of security for herself and for the children is not a reasonable need.

Although this consideration has played no part in my decision on this issue, I believe that if circumstances change so that here was some particular reason to fear for the safety of the children, and indeed of the wife, then the husband's family would make the necessary arrangements through the corporation. Putting the matter at its very lowest, the corporation has a financial interest in the matter and the protection of the children, and indeed of their mother if not the husband's ex-wife. I repeat however that this has not been a consideration in reaching my decision and I mention the matter simply to record the impression which I form..

If as a matter of principle I had decided that security was a reasonable need for the wife, then I would not have been satisfied with the amount of the cost proposed on behalf of the wife.

The only evidence to support this very substantial claim is very sketchy estimate. I do not feel able to suggest an

alternative figure.

A Second Home

At one point before the hearing of this applicatio, the wife spoke of her wish to have several other homes, namely in North Michigan, in Colorado, in Greece, in London and in Switzerland. Before me it was accepted that this was no more than a dream and the proposal became that the wife should have capital sum to buy a house in a fashionable part of North Michigan at Charlevoix or Harbour Springs at a cost of about £1 million plus about £600,000 for furnishings and security. Additionally, of course there would be an annual need for the upkeep of the property. Bearing in mind that the children are still in school and that the wife says that she intends to take at lease five major holidays each year, it is difficult to see that she would have much time available to spend at a second home and she certainly seemed to me to be unconvincing on this topic. Here again I concluded that the question of a second home was raised by the wife simply to enlarge her claim in this application and I was very far from being satisfied that she had any settled intention to acquire such property. Accordingly I have left out of account the capital cost and the running costs of a second home. Nonetheless I propose to bear in mind the possibility of the wife eventually have a second home when I come to the ultimate decision on this application. However it would not be reasonable to have in mind a second home of the capital or annual costs spoken

to by Mr. Cendrowski.

Improvements to the Okemos Property

It was suggested on the wife's behalf that for one reason or another it would be necessary to expend about £1 million in improving or modifying the Okemos house. Moreover her budget includes an item of £104,000 as being the continuing annual need to acquire new furniture. I reject these claims as being wholly unreasonable. Indeed they seem to me to be simply another example of the extravagant suggestions that are put forward in order to support the wife's overall claims.

The Cost of Running the Home in Okemos

The cost of maintaining the home in Okemos in the past is in stark contrast with the claims advocated by Mr. Cendrowski. It would seem to me reasonable for the wife to have one full-time domestic and one half-time and also to have the equivalent of one full-time person to work outside the home and maintain the grounds. The budgets put forward include a number of items ranging from (in Mr. Cendrowski's budget) floor maintenance and restoration £7,333; landscape and design fees £30,000 annually; replacement of glass and mirrors £1,333 and snow clearing £2,600. Mr. Freeman's figure for the cost of maintaining the Okemos home is £79,000 per annum. For this purpose I omit his contingency of £18,400. I think Mr. Freeman's figure is too low and

£100,000 would be generous but realistic.

My Conclusions as to the Wife's Annual Needs

I reject Mr. Cendrowski's figure of £3,146,541 as being extravagant and contrived for the purpose. Mr. Freeman's final figure of £260,000 (omitting the £18,400 contingency) seems to me nearer the mark. However every one of the 205 items in the wife's budget can be the subject of debate and adjustment. I repeat that in my view these budgets are no more than a tool to enable a judge to arrive at a figure for the wife's reasonable annual needs. Having considered the very considerable detail that is available to me, I now stand back from that detail and look at the wife's future position overall I hold that what I will refer to as her routine annual needs would be met at current prices by £300,000 per annum.

In reaching this conclusion I have borne in mind that my figure will seem out of proportion to the equivalent annual expenditure (excluding capital items) of the whole family prior to the break-up of the marriage.

Duxbury Calculation

A Duxbury calculation is never more than a tool but in the financial circumstances of this case it is a particularly fragile tool. As always in these cases there has been criticism and debate focused on the underlying assumptions in the ordinary Duxbury calculation. Mr. Freeman supported

assumptions which seemed to me to be as reasonable as they ever can be, given the obvious and inherent weaknesses of the Duxbury approach but he suggested a possible return in real terms of about 2.5%. On the other hand, whilst Mr. Cendrowski's assumptions seemed reasonable enough when considered individually, they provide a real return of only 0.88% and that does not seem to me to be at all realistic as the net return for someone having capital of the amount which I propose to award in this case.

Mr. Singleton submitted that the calculation should allow for a "step-down" after 12 years. Usually this concept arises in cases of more limited capital where the suggestion is that when the children leave home the wife will be able to move to less expensive accommodation, thereby releasing capital. In such a case the conventional Duxbury calculation requires allowance to be made for this extra capital becoming available in the future.

In the present case the suggestion is not that at some stage in the future the wife could release capital by moving to less expensive accommodation but that her reasonable annual needs will decline with the years. The submission is based on the judgment of Mr. Justice Thorpe in F v. F [1995] 2 F.L.R. 45 where he said (at p. 67):

> *In this particular case, in order to arrive at something approaching a fair conclusion it is, in my judgment, essential to identify and

> separately finance the element of expenditure which is directly or indirectly attributable to children, and by that means refine, as far as rationally possible, the element that relates to the wife. I think that Mr. Lawrence of Cooper and Librand has right principle and good sense on his side when he distinguishes between the years of maternal responsibility and the potential years of down beyond".

At p. 68 he said:

> "It is quite unrealistic not to recognize that future expenditure, like past expenditure, is never uniform but always evolving. At different stages of human span the character of individual expenditure is very variable. the wife, in her middle thirties, is at a stage in life when her expenditure is on the flood. She has established social relationships with very rich cosmopolitan people. She has no doubt a position to maintain in that world which justifies an annual budget as high as it stands even after pruning. But as she ages so will her tastes, her recreations, and her value change. I accept the worldly wisdom with which Mr. Dreeb emphasizes that, save in the area of medical expense, the graph of expenditure is a declining graph as age progresses."

The circumstances of the wife in this case seem to me to be significantly different from those of the wife in F.v.F. I accept the thrust of submission but in applying it to the circumstances of the present case it does not seem to me to be

a factor to which I should give full effect. The wife in this case has in the past led a relatively modest social life and, whilst her needs may change and indeed may well reduce in the course of time, it does not seem to me that at any point in the future her way of life will change dramatically.

In considering the various Duxbury calculations put forward I have sought also to bear in mind as best I can that whereas in the United States tax on capital gains is only 32.15%, there is no provision for indexation to shelter the gain against inflation.

I have taken account of these considerations and of the submissions urged upon me. I have decided to take £6 million as the capitalized cost of providing the wife with sufficient funds to meet what I have called her annual routine expenditure.

The Wife's Capital Needs

The wife has a well furnish and prestigious home in Okemos. I hold that she has no further reasonable capital requirements.

Submissions on Behalf of the Wife

1 The English court has no jurisdiction in this matter, the only courts with such jurisdiction being the courts of the State of Michigan.

I reject that submission. The husband satisfied the

statutory grounds for filing a petition and in English law it follows that this court has jurisdiction to deal with financial ancillary relief.

2. If this court decides to exercise its jurisdiction in the matter then it should do so by applying the law of the State of Michigan.

Of course in commercial contracts it is common for the parties to agree the law of the contract and indeed the appropriate forum for resolution of disputes. However the jurisdiction which I am called upon to exercise is one which is conferred by Parliament and it is not possible for the parties to oust that jurisdiction by agreement. I must apply English law. (Thyssen-Bornemisza (No. 2) 1985 F.L.R. 1069 at p. 1076B and 1077G).

3. The wife does not wish to make any claim in this court. It is the fact that in her Answer the wife made claim the full range of ancillary relief available to a wife under the Matrimonial Causes Act 1973. That remained her position even when her Answer was remanded on 27th July 1995.

The wife sought to explain this position which would seem to be inconsistent with her submission that the English court has no jurisdiction or alternatively should not exercise it. It was submitted that the

Prayer made in her Answer was necessary so that she would be able to apply for temporary financial relief under the Domicile and Matrimonial Proceedings Act 1973 if she were successful in her application for the stay or dismissal of the husband's petition. I reflect this submission. Not only are the powers under the Act of very restricted nature but the wife was asking in terms for the full relief available under the Matrimonial Causes Act 1973.

Moreover, whilst the court cannot compel a party to litigation to proceed with their claim, withdrawal is another matter and certainly requires the consent of the court where, as here, the litigation is not adversarial in the ordinary sense and there are positive duties imposed upon the court itself.

4. <u>The court has no power to make an order against a husband on his own application unless there is an issue before the court.</u>

The realization that a party could obtain an order for financial ancillary relief against him or herself, had its origin I believe in an initiative of Mr. Mathew Thorpe, Q.C. In a case before Eastham J. a wife, who was seeking to have financial issues resolved in California had made no application for financial support for their child but the bickering over what the

husband should be providing was a source of aggravation between them. On behalf of the husband, Mr. Thorpe, Q.C. invited the judge to determine the amount of financial support that he should make; and Easthan J. did so. The decision became widely known amongst the profession but was never reported. However the matter is now firmly part of English law; Peacock v. Peacock [1984] 1 W.L.R. 532 at p. 535C-G; Simister v. Simister [1986] 1 W.L.R. 1463 a p. 1467D; Sherdly v. Sherdly [1988] A.C. 213 at p. 225A.

In the present case the husband's reason for seeking an order against himself is that he wishes finality and to have the financial issues between himself and his wife resolved by this court as being the more appropriate jurisdiction. Furthermore in the proceedings which the wife is pursuing in the courts of the State of Michigan the husband seeks to argue that that court should not exercise any jurisdiction in the matter and the existence of an order made by the English court will submits, assist him in that endeavor.

I hold that there is undoubtedly an issue between the husband and the wife as to the amount of his liability to her arising out of the breakdown of their marriage. I hold that both husband and wife have made

application to this court but even if the wife had not made such an application, then I would nonetheless exercise the jurisdiction to determine the husband's application.

5. "The millionaire's defence" or the ceiling".

Mr. Munby was here referring to the dictum of Ormond L.J. in Preston v. Preston [1982] Fam 17 at p.28H:

> "I think that on the true construction of s25 there does come a point in cases where the available resources are very large, as (counsel) submitted, when the amount required to fulfil its terms "levels off", and re-distribution of capital as such, in some unspecified ratio begins, which is outside the section. The problem however remains to determine where the leveling off point lies."

In Thyssen-Bornemisza (No. 2) 1985 F.L.R. 1069 Griffiths L.J. said:

> "...under English law she has no prospect of receiving a significantly higher award because her husband might turn out to have a fortune in page 5022 the order of $1,000 million

rather than of $400 million."

Mr. Munby submitted that by these observations the court was wrongly imposing a limit to the amount which could be awarded in a case such as this were the assets are very substantial.

In deciding what is fair, just and reasonable I have not felt limited by any "ceiling" or arbitrary limit to the amount which I can award to the wife in the present case; nor do I think that this was the intention of the Court of Appeal in the passage cited above. In both those cases the focus was on the determination of the sum necessary to meet the reasonable requirements of the wife. The approach of the court was therefore no different from that described by Dunn L.J. in Page v. Page (1981) 2 F.L.R. 198 at p.203A;

> "The correct approach to capital provision in such a case as this is in my judgment for the court to consider each of the several matters set out in s25(1) of the Matrimonial Causes Act 1973, the weight to be attached to each will vary from case to case but the most significant are usually (my underlining) the financial resources of the husband, including any obligations of his other that to the wife; and the reasonable requirements of the wife having regard to the standard of living enjoyed by the parties during the marriage and to any reasonable obligations of hers."

Whilst the point does not seem to be material to the circumstances in the ordinary case where the resources are limited to best provision that the court can make for a wife is made by matching her reasonable requirements against resources of the husband. In such a case there is no doubt a limit to the amount for which any wife can sensibly ask.

This is very far from being such a case. I do not regard myself as being in any way limited in the provision which I can make for this wife. Had this been a case of the kind referred to by Sir Jocelyn Simon (above) and the assets available had been generated by the combined efforts, thus described, of the husband and wife during the marriage, then, as I indicated ion argument, I would have been disposed to make a much greater provision than that which I propose.

Conclusion

I have to arrive at a figure which is fair, just and reasonable. I have to achieve that objective by considering each of the factors specifically mentioned in s25 and all of the other circumstances of the case which seems to me properly to be weighed in the balance. In seeking to achieve justice I am not limited to the reasonable annual expenditure of the wife, which Mr. Singleton described as being her "reasonable needs" or to such other matters as Mr. Singleton described as constituting her "reasonable

requirements".

Where resources are limited it is possible, and indeed necessary, for the court to strive towards precision in relation to each of the financial factors involved. Indeed the more limited the financial resources, the more difficult becomes the balancing exercise under s25 if the Court is to make an order which is fair, just and reasonable.

In a case such as the present the court must, as I have sought to do in this judgment, make whatever findings seem material to the balancing exercise but doing so on the clear understanding that such findings are intended to provide only general guidance as to the weight to be attached to the individual statutory criteria.

The wife already has the house in Okemos which I take as representing $1 million and I have had regard to her outstanding liability for her own legal and other professional costs. I have assessed her reasonable annual routine needs as equivalent to $6 million. As to any extra provision I start with the dictum of Oliver L.J. in re Besterman deed (1984) 1 Ch 458 at p. 478G:

> "...the calculation in cases of this sort is, of necessity, not one where any precision is possible, but for my part I take the view that reasonable provision in this case would dictate that, in addition to the secure roof over her head, the wife should have available

> to her a capital sum of sufficient size not simply to enable her to purchase an adequate annuity according to present day needs, but to provide her with the income which she needs and a cushion in the form of available capital which will enable her to meet all reasonable foreseeable contingencies".

Oliver L.J. then described the purposes which he had in mind in providing such a cushion. His judgment had the agreement of Fox and Robert Goff L.J.J.

By my order I do not intend to provide a cushion in the sense. Rather does it seem top me that it is a reasonable requirement of this wife, particularly given the financial assets available, that she should have available to her a capital sum to enable her to indulge herself in items of capital expenditure or additional annual commitment over and above those for which I have provided for her annual routine support. Such items might include some particularly splendid outfit for some particular event the occasional use of chartered planes, the purchase of a picture, or even of a small second home.

In deciding to make some extra provision over and above my assessment of what is necessary to meet the wife's routine annual expenditure I have borne in mind the observations of the Court of Appeal in O'Neill v. O'Neill (1993) 2 F.C.R. 297 and Thorpe J. in H v. H (1993) 2 F.L.R. 335 at p. 349F to 350C. The resources available in

those cases make them readily distinguishable from the present case. Indeed in H v. H the effect of the order under appeal to Thorpe J. had been to give the wife 61% of the available assets. In both cases the assets available were within relatively normal bounds where it was not appropriate, as a matter of justice between the spouses, to make a provision for the wife which was not justified by evidence relating to her reasonable need. In the present case, however, emphasizing that need is only one of the statutory criteria, it seems to me that, as a matter of justice, this particular wife has reasonable requirements over and above those which I have accepted as being necessary for her annual routine expenditure. I have not found it possible to identify any other individual item,. be it a second home or be it occasional use of chartered aircraft, as constituting a reasonable need either for capital or continuing expense. However, I am firmly of the view that it is a perfectly reasonable requirement of this wife that she should have available a fund out of which she can choose to meet some occasional expenditure, perhaps even luxury, over and above what I have regarded as her reasonable routine need.

Having regard to all the relevant considerations the question posed becomes:

> "What overall provision for this former wife of this former husband would be fair, just and reasonable?"

My answer is $10 million.

I shall wish to hear submissions as to the detail of the order but, subject to such submissions, I would propose to order the wife to transfer to the husband her interest in the house in Kensington; and to him or his order her shares in his family's corporation. As to the latter, the policy of finality in matrimonial matters which is now so firmly established in the law seems to me to require the wife to be divested of any interest in the husband's business affairs. I will also order the wife to deliver up to the husband in their present condition the four motor cars which are accepted a s being his property and which are presently located at Okemos. On the wife complying with these orders or within 48 days of this order whichever be the later, I would order the husband to pay to the wife a lump sum of $9 million. On these various orders being compiled with, I would order that the claim of each against the other, including any claim that might arise under the Inheritance (Provision for Family and Dependants) Act 1975, shall stand dismissed.

Whilst it is inherent in a situation where a wife is primary carer for two children that her budgetary requirements will include an element of provision for the children, at least directly or indirectly, the wife's budget has not made provision for a number of continuing expenses which she will incur on behalf of the children. They will

grow up in a wider family where their cousins and others will enjoy a very high standard of living. The children may wish to ski or to ride or to indulge in expensive hobbies of one kind or another. There has been no contest of any substance about the amount of the provision that I should make for the children. The husband has indicated clearly that he will pay, and pay willingly, whatever is judged to be appropriate and will additionally meet the education costs of the children. I shall make orders in favor of each child at the rate of $30,000 per annum with effect from the date of this order. I do so on the basis of the agreed understanding that such orders will not be subject to tax in the hands of the children.

MISS WILBOURNE: Would your Lordship just give me a moment? (After a pause):

MR. SINGLETON: My Lord, I am sorry, I am afraid I was taking instructions about another matter. Did your Lordship say $30,000 per annum per child?

MR. JUSTICE JOHNSON: Per child, yes.

MR. SINGLETON: My Lord, may we seek clarification? The total sum is $10 million.

MR. JUSTICE JOHNSON: Yes. That is to say Okemos plus -----

MR. SINGLETON: Of course.

MR. JUSTICE JOHNSON: She already has Okemos.

MR. SINGLETON: She keeps Okemos, she gives the husband the shares, she transfers the motor cars and she has a total of $10 million including the 6.

MR. JUSTICE JOHNSON: That is right.

MR. SINGLETON: I am obliged. My Lord, may I raise a number of peripheral matters. I have to say that I was not able to ---- again I was considering another matter at the time. Your Lordship I think said time for compliance is 48 days upon which the husband pays the lump sum. Is that right?

MR. JUSTICE JOHNSON: I said that it would be 48 days or Mrs. Dart complying with the orders against her, whichever was the later.

MR. SINGLETON: My Lord, yes.

MR. JUSTICE JOHNSON: But those were simply my proposals subject to hearing submissions from both sides.

MR. SINGLETON: My Lord, I am obliged. It is just that my instant reaction was that this is going to take it beyond the date of the Michigan hearing and I strongly suspect - I do not know, my learned friend may be able to help about this - in view of the wife's stance so far (and this is not a criticism of the English lawyers so far) I wonder whether the wife is going to comply with anything, and I would like to

take instructions about whether I wish my client's liability to pay anything to be contingent upon her transferring assets to him. It may be that I shall propose to your Lordship a split lump sum or two lump sums, one compromising the vast bulk of the order to be paid pretty smartish and the balance to await compliance by the wife in relation to transfer of the shares and possibly the motor cars as well. But may I take instructions about that? I should not think that will take very long at all.

There is another matter. Your Lordship I think has not mentioned - simply because it is already agreed but it needs to be put in the order - that the husband is going to transfer to the wife some pictures. There are some pictures that she has asked to have. It has been agreed in correspondence that she may have them but the agreement was always, so to speak, without prejudice to the contentions of the parties as to who owned them, and so there will be a transfer of ownership from his share of ownership to the wife.

My I also clarify: your Lordship is therefore clearly making an order, so to speak under both heads of both application, and the dismissal of the parties' claim follows thereon. I am also anxious, your Lordship said that ---- I am afraid I cannot find my note at the moment but the essence of what you said was that dismissal of the remaining outstanding claims insofar as your Lordship had not dealt

with them would follow on compliance with the orders. Again, because I am not sure that the wife is going to do I am anxious that, unless your Lordship thought there was a good reason to the contrary, upon payment by my client of the large part of the lump sum, if that is the way that it is to be, the claims should then be dismissed and that if the wife refuses to pass over the shares to the husband or to his order, he can take steps under that order, rather than having to try to activate some other sort of periodical payment application or secure provision. I am, for obvious reasons, anxious to dispose of all the orders in this court as son as is reasonably practicable.

MR. JUSTICE JOHNSON: Mr. Singleton, might it be the most efficient course if I were to adjourn, and for you and Miss Wilbourne and your respective solicitors to discuss the important details, truly important details, so that we have actually got a document which is on the table to discuss?

MR. SINGLETON: Of course, my Lord. But I am raising these points on a preliminary basis so that your Lordship should know what the thinking on this side of the court is.

MR. JUSTICE JOHNSON: I understand that point.

MR. SINGLETON: It would be helpful as to whether or not your Lordship though those were useful observations and you thought that nevertheless you, so to speak, agree

with them or do not agree with them, if I may put it like that.

MR. JUSTICE JOHNSON: It would be discourteous for me to suggest that your submissions were ever other than entirely useful, Mr. Singleton.

MR. SINGLETON: Thank you, my Lord. May I raise another point as to an observation made by your Lordship in the judgment about the arrangement between Mr. Dart and his brother Ken in 1994. The arrangement was complicated and your Lordship arrived absolutely at the right figure of $483 million. I think the arrangement - and my client had to think a bit about this himself - was that Ken took on the liability of $252 million but he also took on the assets of $732 million as well. So the net consequences was that my client disposed of the liabilities to Ken but also disposed of $734,769,000 of assets. So the net effect was, as your Lordship has said, that the net value to the husband $483,689,929. Your Lordship had said that my client took on the liabilities; I think he disposed of the gross assets and the liabilities as well. But your Lordship's net effect is absolutely right, it is just the route.

MR. JUSTICE JOHNSON: I think I am misreading my somewhat inadequate handwriting. I have found the passage.

MR. SINGLETON: There are assets of $734 million.

There were liabilities of $252 million. They were both transferred across but, as your Lordship has said, the net effect was indeed that the net value to the husband of the assets was $483 million and he exchanged those for a loan note of $508 million. So he did rather well.

Before I deal with the most important matter, may I just pick up one peripheral matter that needs to be addressed? Your Lordship does not have any bundles at all I see. You do not need to. May I just hand up mine? Would your Lordship look at B19 and C184? (Same handed). B19 is the order that your Lordship made when granting the decree of divorce and you made an order that I am afraid is inadequately reflected in the order that is made, and that is as to the costs reserved. Your Lordship sees that the order says "costs reserved to the ancillary relief hearing" but it does not actually say what it is about. So I have found the relevant passage in the transcript and those are the costs that your Lordship reserved. It is the costs of the divorce that were reserved to today and your Lordship has very much in mind, I am sure, the fight that there was to obtain divorce and indeed the divorce itself did not go consensually. It went non obstinate by Mr. Munby being present and your Lordship hearing from -----

MR. JUSTICE JOHNSON: I do not follow the difficulty. The 27th July was the date of the hearing of the petition and the grant of the decree nisi?

MR. SINGLETON: Yes. I was simply concerned that the words "costs be reserved" might appear just to be for that hearing and the hearing appears to be for directions.

MR. JUSTICE JOHNSON: I see. I have the point.

MR. SINGLETON: (Counsel conferred). I am obliged. Unfortunately there are two different orders, because there is a decree nisi in another part of the bundle, my Lord, and that does not refer to ----

MR. JUSTICE JOHNSON: I am happy to see that what I said seems plain enough. I reserved the costs of the suit.

MR. SINGLETON: Absolutely. I seek those. I have nothing to add on that.

I also seek the costs of the ancillary relief proceedings.

MR. JUSTICE JOHNSON: I am aware of the offer.

MR. SINGLETON: I am obliged. Your Lordship is aware that that was the husband's only offer. He made it at an early stage. Your Lordship has made observations about the costs. I seek the costs. This is not a case in which the wife is not going to be able, so to speak, to afford them. I seek the costs and I also ask your Lordship to look at some authorities. (Same handed). There are three authorities that I wish to refer your Lordship to. One of them is Gojkovic and the others are ----

MR. JUSTICE JOHNSON: At the moment you have given me two cases, one called A and the other called B, but not Gojkovic.

MR. SINGLETON: My Lord, no, because it is in the bundle. I think your Lordship does need this bundle.

MR. JUSTICE JOHNSON: It is in the white bundle, yes.

MR. SINGLETON: In Gojkovic your Lordship has observed the court's comments about costs during the course of the hearing when there was a reference about my client's offer. The relevant part of Gojkovic is what is known as Gojkovic No.2 which starts on p. 54 of Gojkovic. My learned friend has got the Family Law Reports, so I will try and take her to the page.

MR. JUSTICE JOHNSON: Page Number?

MR. SINGLETON: The page that I am asking your Lordship to look at is that part which begins at p. 54 when the costs appeal is dealt with. My learned friend is in some difficulty because she does not have the authorized report. I will stand in front of her, if I may, and make my points. May I refer your Lordship to p. 56? This is the judgment of Lady Justice Butler-Sloss. At letter G she says:

> "What are the principles governing costs in applications for financial relief in the Family Division..."

and thereafter starts the debate or the discussion. At the top

of p. 57 at letter B:

> "However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is the costs prima facie follow the event..."

Then there is a reference to Singer v Sharegin. There is then a discussion about legal aid and the inadequacy of financial assets and how that impinges sometimes on the orders that the courts wish or otherwise might make as to costs. Then at the bottom of p. 57 at letter H:

> "There is, however, a minority of cases, of which the present appeal is an example, where the assets are substantial and an order for costs can (if appropriate) be made. In such cases the parties are likely to negotiate, and such negotiation, which may lead to a settlement, is much encouraged by the courts."

Then over the page on p.58 there is a small passage in Singer v Sharegin referred to at the bottom of the page. There is a reference to the judgment of Lord Justice Cumming-Bruce. He said:

> "The estimates enable the judge to work out the possible beneficial effect of hypothetical orders [this is the costs estimate] and he can proceed on the basis that the party costs will be paid by the respondent unless the respondent has protected himself or herself by a Calderbank offer. Then if the applicant has refused what the judge regards as a

> reasonable offer, he must face the consequences of his refusal by paying both his own costs and the cost of the respondent in so far as they accrued after a reasonable period of consideration of the offer."

Then there is a reference to Lord Justice Oliver in Cutts v.Head. I do not need to trouble your Lordship with that at the moment. At letter B on p. 59:

> "It is therefore clear that Calderbank offers require to have teeth in order for them to be effective. This is recognised by the requirement in Ord. 62. . .as amended, for the Court to take account of Calderbank offers, and by analogy open offer, in exercising its discretion as to costs. There are certain preconditions. Other parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the application to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter-offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by Calderbank offers, both adopted by the husband in this case. It is a matter for the parties which procedures they prefer."

MR. JUSTICE JOHNSON: You are coming to p.60, letter G ----

MR. SINGLETON: Has your Lordship reached:

> "The absence of an offer or of a counter-offer may well be reflected in costs. . ."

because I remind your Lordship that I made an offer in October and —

MR. JUSTICE JOHNSON: Where are you pointing to?

MR. SINGLETON: I am pointing at p.59E:

> "There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for instance. . . material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples."

MR. JUSTICE JOHNSON: Yes. At p.60G the learned Lord Justice said:

> ". . .the wife's failure to make a counter-offer may be a matter for considerable criticism by the Court and may properly be penalised in costs. . ."

MR. SINGLETON: Yes. Your Lordship has arrived at the point.

MR. JUSTICE JOHNSON: Yes.

MR. SINGLETON: Then there is also ----

MR. JUSTICE JOHNSON: I am aware of the offer made in

October. Is there any other offer or counter-offer to which I should have regard?

MR. SINGLETON: My Lord, no.

MR. JUSTICE JOHNSON: Well, Mr. Singleton, it is inherent in what you have been saying that you are asking for costs? Do I have that right?

MR. SINGLETON: Your Lordship has that right. I go beyond just asking for normally, and I accept this – perhaps I could expand slightly. Normally one would say that the husband made an offer, the wife should have her costs down to 21 days after the event and then the husband should have his costs thereafter. But it goes further than that in this case because the wife – I have not only succeeded in the quantum, I have succeeded in the principle and that is an important matter. I am actually the party who has succeeded from the very start, if I may put it like this. It is as though I were the wife, because the wife in this case, although your Lordship has made observations about her having initiated her own application in the amended answer, has never pursued it, and I am actually, so to speak, the applicant from the very beginning.

So it is not just a matter of my paying costs up to a certain date and then having my costs after that; I should have my costs throughout because the wife has throughout resisted my attempt to be ordered to pay a sum of money to her. So I have succeeded in my attempt to be ordered to pay

a sum of money to her. I have also got the figure right.

There is a third issue and that is the issue of the costs of the way the proceedings have had to be conducted. The costs of discovery. Yes, your Lordship has never had to rule on discovery; that was because we knew full well, because Mr. Munby said so, that he was going to the House of Lords if the court did have to rule on discovery, and we were very anxious, as your Lordship observed in your judgment just now, that that should not happen and that the delay consequent on that should not arise. So there is that aspect as well. The costs have been massively inflated. We put forward our figure as to what our client's worth was in bundle F. We put it forward on 27th June 1995. We said what we were worth. We even - and this is a document which has scarcely been looked at in the case - put forward what was admittedly a very first stab at it, but we put forward what we thought was the analysis of the parties' expenditure in 1993 and 1994 in the affidavit, because Mr. Freeman, as he told your Lordship, had done some preliminary work on it.

So we did our best to put those forward. Your Lordship sees those at p.--- I do not know whether your Lordship has bundle F. I do not think you do. But you see that we put forward expenditure totals. Your Lordship knows what we have had to do in order to meet Mr. Cendrowski's recent comments about the failure of the husband to deal properly with the expenditure of the family

and that there must be other spending from elsewhere. All that was done, it is fair to say, by June 1995, had been an analysis of the Barclays joint account, which is the most important English account, and of the Co-America figure - the Co-America account appear on p. 181. But the figures were set out, the accounts were there, and it was just a matter of adding it all up.

MR. JUSTICE JOHNSON: I do not have the correspondence bundle in front of me. Do not worry. I know it is p. 168. What is the date of the offer?'

MR. SINGLETON: 19th October.

MR. JUSTICE JOHNSON: The offer was £11 million?

MR. SINGLETON: The offer was: keep the house, £10 million. She could actually keep her shares, he was offering that, and he would pay her costs in this country of the ancillary relief proceedings to be taxed if not agreed.

MR. JUSTICE JOHNSON: So what is your application now?

MR. SINGLETON: My application is, because of the way it was run and the case has gone, that I should simply have my costs throughout and that obviously on a - well, my Lord, I would like to ask for indemnity costs, but I should have my costs throughout and that any question of the wife having her costs up to that date should go because that offer was not accepted. I have succeeded all along the line, I am the successful applicant in a sense. So those are my

submissions.

MR. JUSTICE JOHNSON: I am not sure whether or not you are asking for costs on the indemnity basis from what you have just said.

MR. SINGLETON: Your Lordship should think about costs on an indemnity basis in certain aspects of the ----

MR. JUSTICE JOHNSON: I think about all sorts of things but ----

MR. SINGLETON: In relation to the ----

MR. JUSTICE JOHNSON: I adjudicate on applications and ----

MR. SINGLETON: My Lord, I will make an application after I have taken formal instructions. (After a pause): My Lord, it is the costs of discovery that I am really after on an indemnity basis. I would seek that your Lordship dealt with the costs of discovery on an indemnity basis and the remainder on a standard basis.

MR. JUSTICE JOHNSON: Mr. Singleton, what would be the form of order? It sounds a nightmare in assessing.

MR. SINGLETON: It would be a matter of taxation, my Lord.

MR. JUSTICE JOHNSON: I follow that, but it would be easy for me to make an order using the form of words that you have just used, but it would be a nightmare for the district judge who had to assess the costs.

MR. SINGLETON: I think if your Lordship were to say that it would relate to Mr. Freeman's part in the case and to the answering of the questionnaires that were delivered, that would compartmentalise very tightly what I was saying. I am also of course mindful that we did it without an order, and I recognise that that might be reflected in any approach that your Lordship had. But, nevertheless, it was an unreasonable request and was dealt with in the way that we dealt with it because of the threat that had been made.

MISS WILLBOURNE: My Lord, I have several points to make and can I take them fairly shortly one after another?

I resist the application for costs. I resist it on the primary point that your Lordship has calculated to a fine degree the requirements of the wife, and if I can analyse it in this way you have given her a Duxbury figure of 6 million, you have left her with the Okemos property which is worth approximately 1 million and you have written in a contingency fund of, shall we say, 3 million on top of that, in respect of which she has to give the husband back certain items. So the net effect in the wife's hands, if one ignores Okemos as not being realisable money and one recognises the value of what she has to transfer back to the husband, she is left with, on my calculations, net 5.173 million.

My Lord, if you order her to pay the husband's costs, those very fine calculations that you have done mean, to look at it from another way, the 3 million contingency

fund that you have given her has to suffer a diminution of, on my calculations, something less than the total figure the husband is asking for, 877,000. My point about that is that is simply unfair.

My second point is this: Mr. Singleton is right to say — (counsel conferred). Could we have an exact figure that he is asking for?

MR. SINGLETON: I am asking for my costs of the ancillary relief proceedings.

MISS WILLBOURNE: 400,000 and something, my Lord, on that basis.

My second point is this. Mr. Singleton points to his open offer letter of 19th October and effectively says to your Lordship: "I am in the position of the applicant wife in this case, I have succeeded on my open offer figure of £10 million," and he points to the wife's failure in this case to negotiate. He is right to say that there is no Calderbank offer from our side, he is wrong to say that we failed to negotiate. I cannot show you the content of the letter but the date of the letter I can give you because you will see from the date of the letter - because it was without prejudice but it did not say "save as to costs" - the letter that we wrote in connection with this is dated 7th March. So there was no failure to negotiate on our side, there was a negotiation put forward by us, unacceptable to the other side.

MR. SINGLETON: I am very content, if my learned friend

wishes it to be treated as an open letter, that it be treated as an open letter.

MISS WILLBOURNE: No.

MR. SINGLETON: I am content. If she wishes to waive privilege, I shall not ----

MISS WILLBOURNE: I am not waiving it, my Lord. I deliberately did not do so. What I say is that Mr. Singleton's assertion that we failed to negotiate is inaccurate. Gojkovic, analysing it in detail, demonstrates unreasonable positions taken by those seeking ancillary relief orders. Your Lordship has borne in mind throughout that there is a very substantial Michigan element in this case. We have not failed to negotiate. That is all I say.

Would your Lordship just give me a second? (After a pause): My Lord, that is all I have to say on the question of costs.

MR. JUSTICE JOHNSON: Thank you very much.

MR. SINGLETON: I remind your Lordship that the date that you have just been told about was the Thursday before the Monday of the hearing. I am very willing for my learned friend to open that letter to your Lordship. That is a matter for her. Your Lordship can draw your conclusions from the fact that the offer remains unopen.

My Lord, may I do no more than suggest that I am certainly not seeking more than the ancillary relief

proceedings, and they are large enough as they are. The total costs of this application are £477,000.

MR. JUSTICE JOHNSON: I thought you were also asking for the costs of the suit.

MR. SINGLETON: For the divorce, yes. I am sorry, I put that to one ----

MR. JUSTICE JOHNSON: So Miss Willbourne is right.

MR. SINGLETON: No my Lord. I am sorry. The costs of - may we look at my ancillary state. Miss Willbourne has completely misunderstood. The jurisdiction and stay aspects, I have got already, that is 144,000. So you take those off the 801,000.

MR. JUSTICE JOHNSON: So it is simply the divorce suit?

MR. SINGLETON: The children are 14,570. There are the costs of US lawyers other than assisting English lawyers in relation to this application, 166,000. That brings my total of 801,000 to 477,000. The costs of the suit I have no idea but they cannot be more than a few thousand pounds.

MR. JUSTICE JOHNSON: I follow.

MR. SINGLETON: So that is a completely separate matter. May I suggest for your Lordship's consideration that a way that you could approach it, and I regret that I do not have the authority with me but it seems to me that your Lordship will know of Leary anyway, you could just make a Leary order.

MR. JUSTICE JOHNSON: A Leary order, as I recollect, is an exercise by the court of its power to make a summary assessment of costs.

MR. SINGLETON: Yes.

MR. JUSTICE JOHNSON: I think that may be appropriate where the costs are of the order of £200 or £300, but I think where dealing with hundreds of thousands of pounds worth of costs it would be wrong to deprive a litigant of the opportunity of challenging the detail of the amount before the district judge in the ordinary way.

MR. SINGLETON: My Lord, yes. I am putting it forward tentatively but only if your Lordship was against me as to, so to speak, the amount or the expanse of what I was seeking and your Lordship thought you would make an order for a significantly smaller amount. But I do not press it strongly.

MR. JUSTICE JOHNSON: Thank you very much.

MR. SINGLETON: I do however ask, and my instructing solicitor tells me that you are quire right, there are going to be difficulties in working out the accountancy element and the other element, but it is not impossible and I therefore seek the costs as I have asked.

MR. JUSTICE JOHNSON: There seem to me to be two particular factors which I should property take into account. The first is that on 19th October, 1995 the husband made an open offer to the wife which is very substantially greater

than the amount of the order which I have made today. In round terms it was £1 million greater and it also included the important element of offering to pay the wife's costs.

I think the only other matter of difference is that the offer proposed that Mrs. Dart should keep her shares in the corporation and that seemed to me to be unwise for a number of obvious reasons. But of course if I had allowed Mrs. Dart to keep those shares I would have thought it appropriate to award a rather lesser sum than £9 million, so the first factor that I take into account is that the husband made an offer very substantially greater than the amount in my ultimate decision. There was no counter offer, as the Court of Appeal suggested there should have been in the case of Gojkovic.

The second factor is that in my view the wife has caused this case to be conducted in an extravagant way and certainly the discovery that she sought was in my judgment wholly unnecessary.

What I might call the conventional approach, therefore, to the question of costs would be that one might have ordered the husband to pay the wife's costs down to a sensible period after the offer to allow for the offer to be considered but thereafter the husband's costs to be paid by the wife. That does not seem to me appropriate in this case because it does not take sufficient account of the extravagance of the wife's insistence on discovery.

I appreciate, as Mr. Singleton submitted, that it would be possible for me to make an order that dealt separately with the question of discovery, but I think that would create a nightmare situation for the costs draughtsmen on both sides and also for the District Judge. It seems to me likely that much of the cost in this case has been incurred since the husband's offer. Looking at the matter in the round and seeking to make an order that is not only fair but also practical I purpose to order the wife to pay the husband's costs of the application, those costs to be taxed on the standard basis if not agreed. I shall order that the costs of the divorce suit which were previously reserved shall be costs in the application. In effect, therefore, those costs will also be paid by the wife.

MR. SINGLETON: I do apologize, your Lordship has my bundles. I am not sure whether there are any reserved costs apart from that.

MR. JUSTICE JOHNSON: I have looked though.

MR. SINGLETON: Would your Lordship say including any costs reserved?

MR. JUSTICE JOHNSON: I do not want to be imposing on Mrs. Dart some substantial liability without being sure that I know what it is.

MR. SINGLETON: My Lord, I do not think there are any. I suddenly think that my recollection may be wrong. Would your Lordship allow me one moment? (Pause) My Lord,

for the avoidance of all doubt, because I am anxious when we come back in that we are at least agreed on the structure of the order, we are dealing with the Okemos house at £1 million. Miss Willbourne agrees.

MR. JUSTICE JOHNSON: I think, and this you both agree, my decision was that Mrs. Dart should keep the Okemos house and have £9 million.

MR. SINGLETON: My Lord, absolutely, but we have never actually had a formal valuation of the Okemos house and I was very concerned that there should not arise a disagreement between us, probably not between Miss Willbourne and myself but perhaps with the American lawyers in the background and that if your Lordship's figure was £10 million then we would get into an argument, "Oh, the Okemos house is only worth £750,000 and therefore it's £9.25 million," but your Lordship has taken £1 million for Okemos.

MR. JUSTICE JOHNSON: For the avoidance of doubt let me make it plain, that I want Mrs. Dart to have the Okemos house and its contents, apart from the four motor cars which no doubt are in the garage outside, plus £9 million. The Okemos house is a fine house, well designed and well furnished by Mrs. Dart, and it has not really mattered to me whether it was worth something more or something less than £1 million; it is a fine house.

MR. SINGLETON: My Lord, I am obliged. I simply had

my eye on Michigan, as your Lordship might expect.

MR. JUSTICE JOHNSON: My decision is that Mrs. Dart, who already has the house in Okemos, shall have £9 million.

MR. SINGLETON: Thank you, my Lord, I am very much obliged.

MISS WILLBOURNE: That was how I understood your Lordship's judgment to read.

MR. SINGLETON: It is how I understood it but I was anxious that Michigan should understand. Thank you, my Lord.

MISS WILLBOURNE: Before your Lordship rises (I can see you tentatively rising from your Lordship's chair) can I turn to another topic and that is leave to appeal. I see Mr. Munby has already said down many markers in the course of the submissions to your Lordship and I can take you to the transcript references if you will allow me to do so. It has been in the clear contemplation of your Lordship throughout these proceedings that this case will and probably should be scrutinised by the Court of Appeal. I do therefore seek leave to appeal, a leave I believe I need from your Lordship.

MR. JUSTICE JOHNSON:Miss Willbourne, I shall refuse leave but I make plan that my decision is based simply on this consideration; my view is that I have applied the law as it is, I may be wrong about that but that is my belief. Mr. Munby's submissions were based on the submission that the

present law needs to be looked at again and I think whether the Court of Appeal should go though that exercise with a view to the matter going ultimately to the House of Lords is a matter that should be decided by the Court of Appeal itself rather than by me. I think it is for the Court of Appeal to decide whether they want to review the matter rather than for me. So whilst I recognise it may cause a little delay and a little bit of extra expense I refuse your application.

MISS WILLBOURNE: My Lord, there is one other matter and that is this. I am unfamiliar with the procedure in this area: reporting this case. Your Lordship knows that the corpus of knowledge in big money cases is quite small but I think your Lordship observed much earlier on in these proceedings that most of the big money awards are made in the market place, i.e. by negotiation between the parties rather than as a result of contested litigation. It does occur to me that this may be a case that should be reported, with of course due anonymity being recognised.

MR. SINGLETON: My Lord, I would resist that. Your Lordship knows that these cases do acquire some publicity anyway even without reporting. I think that one of the concerns that has been expressed throughout this case has been about publicity and about security and about the family generally.

MR. JUSTICE JOHNSON: Mr. Singleton, might it not be sensible for me to defer a decision on Miss Willbourne's

application until we know the outcome of the application that is proposed to be made to the Court of Appeal?

MR. SINGLETON: My Lord, yes.

MR. JUSTICE JOHNSON: If the case is going to the Court of Appeal then it will be dealt with by the Court of Appeal in open court and what I have said will be of no interest to anyone.

MR. SINGLETON: My Lord, I am sure it will be of great interest, particularly to the Court of Appeal.

MISS WILLBOURNE: It probably would.

MR. SINGLETON: My Lord, I have not asked and I should not have to ask because Mr. Marks should be here; would your Lordship grant a certificate for two counsel?

MISS WILLBOURNE: And the same for us, please, my Lord; in fact I think it is a certificate for three counsel but I do not think there is any provision for that, so a certificate for two counsel. Thank you.

MR. JUSTICE JOHNSON: Miss Willbourne, at this stage I will not give leave for the matter to be reported but that is not a final view; I would like just to see what happens with the Court of Appeal. It might be that if the Court of Appeal refused leave it would be an appropriate case to be reported but if on the other hand the case is going to be reviewed by the Court of Appeal there is no point particularly in having my contribution to the jurisprudence recorded in the reports.

MISS WILLBOURNE: My Lord, I think your contribution, if I may say so without sounding inappropriate, has been invaluable and I hope we shall all be poring every word in the Court of Appeal.

MR. SINGLETON: My Lord, may we, if we are able to, bring an order before the court by the close of today or if for some reason we cannot agree by first thing Monday morning?

MR. JUSTICE JOHNSON: No, because I will not be here.

MR. SINGLETON: In that case it has got to be this afternoon.

MR. JUSTICE JOHNSON: It has got to be today.

MR. SINGLETON: Thank you, my Lord.

(Adjourned for a short time)

MR. SINGLETON: My Lord, I have an order. We are very grateful to your Lordship for sitting. I have realised immediately, having been told so by Miss Willbourne, that I have left something off it, and that was to do with leave to appeal. But I have brought my computer just in case there was a problem and the associate says that I can plug it into her printer down in the associate room, so one needs to add at the end of this that the application by the respondent for leave to appeal be refused.

MR. JUSTICE JOHNSON: Can I just go through it? In the second paragraph can you delete "in files A to J" and put

"the other documents put in evidence"?

MR. SINGLETON: Does your Lordship therefore wish to delete the respondent's core bundle and so forth? I was simply trying actually to identify them.

MR. JUSTICE JOHNSON: Yes. ". . and other documents put in evidence in the agreed bundles." It just looks so mundane. I am sure you are right but it is just a suggestion.

MR. SINGLETON: My Lord, then the words "the respondent's core bundle" would also go out.

MR. JUSTICE JOHNSON: Yes.

MR. SINGLETON: As I think would the bundle of inter-solicitor correspondence because that is an agreed document. I think divers[e] other documents.

MR. JUSTICE JOHNSON: What has prompted me to make these suggestions is that the paragraph beginning: "Upon reading [etc. Concluding with] 50 further files," and I did not read the 50 further files.

MR. SINGLETON: I was very careful to draw a distinction after the word "and" - "and divers[e] other documents including documents being a part of the petitioner's discovery." But I am in your Lordship's hands.

MR. JUSTICE JOHNSON: If you are trying to make that point it is made in my judgment.

MR. SINGLETON: My Lord, yes. Should we just say "upon reading the affidavits and other documents put in

evidence in the agreed bundles?"

MR. JUSTICE JOHNSON: Yes.

MR. SINGLETON: Right.

MISS WILLBOURNE: Except, to be absolutely technical, and it is very technical, my core bundle was not an agreed bundle, so could we just say "the bundles put in evidence – and other documents put in evidence in the bundles before the court," or something like that, may I suggest.

MR. JUSTICE JOHNSON: In the bundles.

MISS WILLBOURNE: In the bundles before the court, I suggest, my Lord.

MR. JUSTICE JOHNSON: At the risk of being called old fashioned, may Freeman and Cendrowski be Mr. Freeman and Mr. Cendrowski? (After a pause): In para. 3 of the order I wonder on reflection whether I was right to suggest "in their present condition." I just was concerned that it might be said that they had been damaged and there would be an argument about that.

MR. SINGLETON: My Lord, "in their present condition" did seem to be fairly neutral because my client has not been there.

MR. JUSTICE JOHNSON: Yes. I was simply trying to avoid there being arguments about their condition when they are handed over. I rather understand that they are of a very distinguished lineage but that they are somewhat elderly.

MR. SINGLETON: My Lord, yes.

MISS WILLBOURNE: My Lord, for our part I was happy with the wording "in their present condition." It seemed to me, with respect, an entirely neutral wording. It can either mean the condition they were in at the time they were stored and if they had been neglected then it is natural wear and tear. I was not connoting into your Lordship's words any suggestion that my client was going to go out there with a mallet and ruin them. So I am happy with the wording as it is.

MR. JUSTICE JOHNSON: No, that was not the intention at all.

MISS WILLBOURNE: I thought not, my Lord.

MR. JUSTICE JOHNSON: My intention was to seek to preempt any kind of argument.

MISS WILLBOURNE: Indeed, my Lord. I took it that way.

MR. SINGLETON: May I mention that your Lordship will see that I provided for my client to do things by 3rd April, and that is the Wednesday before the hearing begins in Michigan. Your Lordship said 48 days for the wife to do things - or, rather, 48 days for my client to do things upon the wife doing things, and I was not sure —

MR. JUSTICE JOHNSON: If you want to do it more promptly —

MR. SINGLETON: I was to do it more promptly and the things that I am asking the wife to do, I am content for her to have 28 days to do it.

MR. JUSTICE JOHNSON: No, I simply took the 48 days from the open offer.

MR. SINGLETON: My Lord, yes.

MR. JUSTICE JOHNSON: In para. 5 the petitioner do[es] transfer - should I say deliver up to the respondent?

MR. SINGLETON: My Lord, yes. Transferred to and deliver up because there is the transfer of title and then there is delivery.

MISS WILLBOURNE: My Lord, on the ground one wonders how this transfer is going to be effected. I imagine that Mr. Dart will not want to go to Michigan to collect them himself.

MR. SINGLETON: He cannot.

MISS WILLBOURNE: He cannot. I imagine that Mrs. Dart, not being back in Michigan, does not literally want to have to arrange for the delivery to England of these items. I wonder if a suitable arrangement is not to be construed into "deliver up" that she delivers them to a member of family or something like that.

MR. SINGLETON: Of course I accept that and I am now on the record. She does not have to get the cars to England.

MR JUSTICE JOHNSON: So far the avoidance of doubt

then, going back to para. 3, "the respondent do within 28 days deliver up to the petitioner, or to his order, in Michigan, possession in their present condition" of certain motor cars.

MISS WILLBOURNE: Yes.

MR. JUSTICE JOHNSON: Then coming back to 5, "transfer to and deliver up to the respondent" – would Miss Bennett be able to take delivery of the four paintings, Miss Willbourne?

MISS WILLBOURNE: I will find out, my Lord. (After a pause): My Lord, the only reservation I have is I wonder what the value of these paintings is. Miss Bennett may have to extend her liability insurance to cover the theft from the office of those paintings. I am a little concerned about that.

MR. SINGLETON: I think the wife put [a] figure on it, and I have brought the file with me in case questions like this arose.

MISS WILLBOURNE: 250,000, I think.

MR. SINGLETON: I was going to say she put a figure on it of 250,000 but of course they have not actually formally been valued.

MR. JUSTICE JOHNSON: Of how much?

MR. SINGLETON: £250,000 she said.

MR. JUSTICE JOHNSON: I can see that Miss Bennett could have an anxiety about that.

MISS WILLBOURNE: My Lord, can he not ship them to Okemos? The gentleman can afford to ship them.

MR. SINGLETON: Yes, of course he can afford it. My Lord, I want to keep the delivery simple, just as the delivery in relation to the cars is to be kept simple. I think the delivery in relation to the pictures ought to be kept simple and I would not want it being said that they had gone astray. Could it not just be delivered to somebody in England on behalf of the wife?

MR. JUSTICE JOHNSON: But who?

MR. SINGLETON: That is to her order. I am not trying to be difficult for the sake of being difficult, but I am simply concerned that this should happen smoothly and quickly and without argument. There is Miss Bennett.

MR. JUSTICE JOHNSON: Well, I understand Miss Bennett's concern.

MR. SINGLETON: My Lord, in Michigan. I have no instructions at all but I am sure that will be all right.

MR. JUSTICE JOHNSON: "Do by 3rd April transfer and deliver up to the respondent in Michigan." Now, do you have any other points on the draft?

MR. SINGLETON: Other than the fact that I have left leave to appeal off, which has to go on under para. 10, or the refusal, I would proposed: "The respondent's application for leave to appeal be refused."

MR. JUSTICE JOHNSON: So, subject to that, you are content with the draft as we now have it?

MR. SINGLETON: Yes.

MR. JUSTICE JOHNSON: Yes, Miss Willbourne?

MISS WILLBOURNE: My Lord, subject to the amendments we have just discussed, I am happy with the form of the words used. The only very tiny reservation I have is in relation to Clause 5, transfer of the Jaguar motor car presently at the Okemos property. I do not quite know what is envisaged. I do not know whether it is in her name and she is not here to tell me, but there is the equivalent of a vehicle registration document in the wife's name, that should be given to her. I hope that is connoted in the words "and if not already in the name o the respondent the Jaguar motor car."

MR. SINGLETON: We do not know whose name it is in, my Lord. We suspect it is in hers but we are not sure and we want to be quite clear about it.

MR. JUSTICE JOHNSON: Ought we then to have a paragraph 11 - "liberty to apply for further directions for the implementation of this order."

MISS WILLBOURNE: Yes, my Lord, I am happy with that.

MR. SINGLETON: In relation to the motor car, can I just make the position clear? I am dealing with, so to speak, the

title, not with title documents and so forth. He can deliver title simply by making a declaration that if the property was his, he transfers it to her. If he has to do something else by 3rd April, given what one knows about sending documents, for example, to Cardiff, if there was a need to transfer the title by a document and for the document to come back from Cardiff, it would not be back by about June. So all I had in mind was that if the car was not hers, he was to write a letter saying: "Insofar as I may have an interest in this motor car, it is now yours, and I will do whatever is needed to transfer it to you if you require a document."

MR. JUSTICE JOHNSON: Shall we say the ownership ----

MR. SINGLETON: My Lord, yes.

MR. JUSTICE JOHNSON: — of the Jaguar motor car?

MR. SINGLETON: I am obliged.

MR. JUSTICE JOHNSON: My Lord, the only other query I have - and I really am in your Lordship's hands about this - arises from para. 7, which is the Inheritance Act dismissal. I have not got the Red Book with me but I see the rather unusual form of words: ". . .such direction being made without prejudice as to whether either party is in fact domiciled in England and Wales." It is a requirement of Inheritance Act dismissal that the party - and I now cannot remember the section but it is the first one under the Act - against whom the potential claim is to be made or is likely to be made shall be domiciled in England and Wales at the

date of the death. It is not clear to me, having been in court for two weeks, whether Mr. Dart is in fact domiciled here or not. I presume that is the point of leaving it in the way that it has been drafted.

MR. SINGLETON: My Lord, yes. It is not required as part of the dismissal. Section 15 of the 1975 Act enables the court to make an order that, as your Lordship well knows, an application on the death of one of the parties shall not be entertained. It says nothing about domicile.

MR. JUSTICE JOHNSON: No. I do not find any difficulty with this form of words.

MR. SINGLETON: My Lord, I am obliged. It is section 2 of course; you can only make an application for an order under section 2 if the person is domiciled, but that is not really the point.

MR. JUSTICE JOHNSON: At the moment you are seeking to protect Mr. Dart's remittance basis for taxation.

MR. SINGLETON: Absolutely. He certainly is not domiciled here and I do not suppose Mrs. Dart is either. But I am simply concerned that this is without prejudice to that point.

MR. JUSTICE JOHNSON: Yes, I follow that. Are there any other points?

MISS WILLBOURNE: Mr. Lord, the only other thing which occurs to me is that before this case started - I have

not discussed it with my learned friend - your Lordship handed down a copy I think to Mr. Munby and Mr. Singleton of a letter from the Inland Revenue Investigations Branch.

MR. JUSTICE JOHNSON: I have a note here to ask you about that.

MISS WILLBOURNE: I am obliged, my Lord.

MR. JUSTICE JOHNSON: My own thinking in the matter is that I ought to have a letter sent to the Inspector of Taxes saying that if he wishes to see any documents then he must apply to me and in that event I would think it appropriate to invite the Attorney General to intervene in the matter, because it seems to me - I have to say that I consulted the President in the matter - that it raises issues of principle in which I ought to proceed somewhat cautiously.

MISS WILLBOURNE: My Lord, yes.

MR. JUSTICE JOHNSON: The court wants to help the Revenue, of course it does, and equally the Inspector has it within his power to ask questions and ask to see documents, but I think the avenue which he has chosen is one which raises points of principle.

MISS WILLBOURNE: My Lord, I am content with that position.

MR. SINGLETON: I am grateful to hear that because I understand it is a fairly common experience in the Registry

for these letters to arrive. It may be an important point.

MR. JUSTICE JOHNSON: As a taxpayer I am glad to see that the Inspectors of Taxes are alert and asking these questions, but I think there are channels. So I will remind myself to do that.

MR. SINGLETON: Thank you, my Lord. I will redraft this and have it printed out now. The associate has been good enough to say I may go down to the associate's room and sort this out down there with a printer.

MR. JUSTICE JOHNSON: If you can do it tonight of course, but otherwise Monday.

MR. SINGLETON: My Lord, I will do it tonight.

MR. JUSTICE JOHNSON: Well, there you are. Gratitude to the associate for staying behind. Thank you both, very much.

MISS WILLBOURNE: Thank you, my Lord.

MR. SINGLETON: Thank you, my Lord.

UPON HEARING Leading and Junior Counsel for the Petitioner and Leading and Junior Counsel for the Respondent

AND UPON reading the affidavits and other documents put in evidence in the bundles before the Court

AND UPON hearing the oral evidence of the Petitioner, the Respondent, Mr. Richard Freeman and Mr. Harry

AND UPON the basis that the Respondent owns the property known as 2700 East Mount Hope, Okemos, Michigan, and its contents, save as herein below provided

AND PURSUANT TO Sections 23, 24 and 24A of the Matrimonial Causes Act 1973 and the Court having regard to all the matters contained in Sections 25 and 25A of that Act

IT IS ORDERED THAT:

1. The Petitioner do pay to the Respondent the following lump sums:

    a. £8,850,000 payable by 4 pm on 3 April 1996

    b. £150,000 payable forthwith upon compliance by the Respondent with her obligation under paragraph 4 of this order

2. The Respondent do within 28 days transfer to the Petitioner her interest in the property known as 1 Upper Phillimore Gardens, London W.8

3. The Respondent do within 28 days deliver up to the Petitioner or to his order in Michigan possession in their present condition of certain motor cars at Okemos aforesaid, being those referred to at File F page 54, namely:

    a. A Porsche index number 643.MZA

    b. A Ferrari index number 900.SWR

c. A Porsche index number 016.FVK

d. A Mitsubishi index number AFB-408

This order being made, so far as is necessary, pursuant to S.17 of the Married Womens Property Act 1882.

4. The Respondent do within 28 days transfer to the Petitioner or to his order the 1,624.16 shares in Dart Container Corporation of California held by her.

5. The Petitioner do by 3 April 1996 transfer and deliver up to the Respondent in Michigan four paintings now at 78 Campden Hill Road, London W.8 and claimed by the Respondent in her affidavit of 21 September 1995 at paragraph 61 (File F page 196) and (if not already in the name of the Respondent) ownership of the Jaguar motor car presently at the Okemos property.

6. Upon payment by the Petitioner of the lump sum of £8,850,000 hereinbefore referred to at paragraph 1.a, save insofar as the same are herein disposed of by the orders herein before set out, each party's claims against the other for periodical payments, secured provision and lump sum and property adjustment orders under Sections 23 and 24 of the Matrimonial Causes Act 1973 do stand dismissed; it being directed pursuant to Section 25A(3) that neither party may make a further application in relation to this marriage for an order under

S.23(1)(a) or (b) thereof.

7. Pursuant to Section 15 of the Inheritance (Provision for Family and Dependants) Act 1975 it is further directed that, upon payment by the Petitioner of the lump sum of £8,850,000 hereinbefore referred to at paragraph 1.a, neither party may apply against the estate of the other for an order under Section 2 of that Act; such direction being made without prejudice to whether either party is in fact domiciled in England and Wales.

8. The Petitioner do pay to the Respondent for the support and maintenance of each of the children of the family William Robert Dart and Arianna Constance Dart periodical payments at the rate of £2,500 per month payable monthly from today until that child shall attain 18 years or cease full time secondary education whichever shall later occur, or until further order of this court.

9. a. The costs of the divorce suit shall be costs in the ancillary relief application.

   b. The Respondent do pay the Petitioner's costs of the ancillary relief application to be taxed if not agreed.

   c. There be certificates for two counsel.

10. The Respondent's application for leave to appeal be refused.

11. There be liberty to apply for further directions as to implementation only.

IN THE SUPREME COURT JUDICATURE **FC3 96/6111/F**

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

FAMILY DIVISION

PRINCIPAL REGISTRY

(HONOURABLE MR. JUSTICE JOHNSON)

Royal Courts of Justice

Strand

London WC2

Tuesday, 2 July 1996

B e f o r e:

LORD JUSTICE BUTLER-SLOSS

LORD JUSTICE PETER GIBSON

LORD JUSTICE THORPE

- - - - - -

ROBERT CHARLES DART

Petitioner/Respondent

-v-

KATINA ESTELLE DART

Respondent/Applicant

- - - - - -

(Handed down Transcript of the Palantype Notes of
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Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MR. JAMES MUNBY QC & MISS CAROLINE WILBOURNE (Instructed by Margaret Bennett Solicitors, Charlton House, 5A Bloomsbury Square, London, WC1A 2LX) appeared on behalf of the Appellant

MR. BARRY SINGLETON QC & MR. LEWIS MARKS (Instructed by Messrs Lee & Pemberton, 45 Pont St, London, SW1X 0BX) appeared on behalf of the Respondent

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JUDGMENT

(As approved by the Court)

LORD JUSTICE THORPE :

Mr and Mrs Dart are aged 37 and 38 years respectively. The both come from Michigan and married on 25th October 1980. There are two children of the marriage, William who is 13 years and Arianna who is ten. The Dart family has made a great fortune by manufacturing foam cups. The husband's father has been the principal architect of this success. It enabled the husband and the wife to live to a higher standard than any of their Michigan friends and associates. The husband bought a substantial site and on it built a lavish home. It was ready for their occupation in September 1989. In the following two calendar years their family expenditure averaged £225K per annum. In 1992 that expenditure rose to nearly £350K. In 1993 the husband and the wife debated tax exile in furtherance of a scheme to vest substantial part of the Dart fortune in the husband. In

the End England was the chosen haven and in August 1993 the family arrived in London with the intention of taking up permanent residence in this jurisdiction. An expensive house was chosen in Upper Phillimore Gardens and large sums were spent on its lavish improvement. It was conveyed into the joint names of the husband and the wife. Shortly thereafter the husband renounced his US citizenship. In 1993 the family's annual expenditure amounted to just over £400K. By the beginning of 1995 the marriage was in difficulty. On 3rd February 1995 the husband petitioned for divorce in the Principal Registry on the grounds of the wife's conduct. Four days later the wife filed a petition for divorce in Michigan. On 3rd March 1995 the wife filed an answer in London challenging the court's jurisdiction, alternatively seeking a stay under paragraph 9 of Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973. However the prayer of that answer sought the full range of ancillary relief for herself and the children rather than the narrow range of ancillary relief which the court has power to order on imposing a stay under Schedule 1. There were Children Act proceedings but on 30th May 1995 the husband agreed to the wife returning with the children to the former matrimonial home in Michigan.

Of course a hazard for very rich families in tax exile is that when the marriage breaks down the first round of contested litigation results from the determination of each of

the spouses that the financial litigation should be in the jurisdiction of his or her preference. After taking independent advice each may have a broadly similar perspective as to which of the available jurisdictions is most likely to prove favourable to an applicant and which to a respondent. It is plain that Mrs Dart decided that she would be better in Michigan whilst Mr Dart thought he would do better in London. The result was competing proceedings in the Principal Registry and in the Ingham County Circuit Court, Michigan. As the jurisdictional race developed the wife applied by a notice of application of 17 May 1995 for the dismissal, alternatively stay, of the husband's petition. On 14th June 1995 Mr Justice Johnson dismissed that application declaring that the husband's petition was well founded on his habitual residence and in the exercise of his discretion rejecting the application brought under paragraph 9 of Schedule 1 of the 1973 Act. The wife's costs in the application of 17th May dismissed 14th June are stated to be £406K. Mr. Justice Johnson ordered the wife to pay the husband's costs of the summons. They amount to £144K and are estimated to tax at £120K. Thus the probable extent of the wife's liability as a result of her challenge to the jurisdiction amounts to some £526K.

Having defeated her jurisdictional challenge the husband issued a notice of application on 28th June 1995 for the court to determine his financial liability to the wife. The

wife, despite the judgment of Mr Justice Johnson of 14th June, continued to pursue competing proceedings in Michigan and on 23rd August 1995 the Michigan court took jurisdiction on marital property. In September 1995 a decrees nisi was pronounced on the husband's London petition and in October that decree was made absolute. In the London ancillary relief proceedings the husband naturally took the *Thyssen* defence to applications for disclosure saying, with evident justification, that since he recognized that he was rich enough to comply with any order that the court might make, detailed financial disclosure was superfluous. Despite the clear and settled law upon which that position rested, the wife's London solicitors on 21st September 1995 served a most detailed questionnaire and threatened that if the husband persisted in his assertion of the *Thyssen* defence the point would be taken to the House of Lords. The husband, no doubt with resignation, submitted and on 20th October 1995 he served his answer backed by 19 pages of schedules and 35 ring binders containing approximately 7000 pages of supporting documents. At about the same time he wrote an open offer to the effect that in an endeavour to end the attrition of the litigation war he would pay her a lump sum of £10M on the basis that she would transfer to him her share of the London house but would retain her sole name the former matrimonial home in Michigan valued at £1M. The wife did

not accept the offer nor did she even respond to it. From 13th February 1996 she served a supplemental questionnaire and what was called a schedule of deficiencies. By then Mr Justice Johnson had a firm grasp of the ancillary relief proceedings and at a pre-trial review on the 15th February counsel on the wife's behalf was obliged to concede that most of the further information sought had in fact already been supplied.

The hearing of the husband's application for the determination of his financial liabilities was fixed for hearing before Mr Justice Johnson on 11th March 1996 with a time estimate of five days. In the preceding week skeleton arguments were lodged. The wife sought for herself £122M in addition to the Michigan home. The husband offered approximately £5M in addition to the Michigan house. At the conclusion of the trial Mr Justice Johnson reserved for a few days and delivering judgment on 21st March ordered the husband to pay a lump sum of £9M in addition to the Michigan house. There was no Calderbank correspondence, the husband's only offer being the open offer of 15th October 1995, never formally withdrawn but implicitly by the delivery of his skeleton argument. The only proposal from the wife was her skeleton claim to a total of £123M. Since by his judgment Mr Justice Johnson required the transfer to the husband not only of the wife's half share in the London home but also her shares in the Dart Company, the offer

exceeded the judgment by £1M in cash and the value of the shares, £150K. Mr Justice Johnson ordered the wife to pay the husband's costs of the ancillary relief proceedings, not only from the date of the offer but throughout in condemnation of her unjustifiable insistence on superfluous detailed disclosure. Subsequently the husband applied to the Michigan court to accord comity to the order of Mr Justice Johnson but his application was refused on the 7th April. However the husband immediately appealed that refusal and the Michigan Court of Appeals on the same day stayed the financial proceedings due to commence on the following day pending determination of the husband's appeal. We were told that that appeal is unlikely to be listed before October and beyond lies the spectre of an appeal to the Michigan Supreme Court and beyond that, subject to leave, to the Federal Court.

In addition to the costs incurred by the wife challenging jurisdiction in London she has incurred costs in Michigan stated to amount to £1M. Her solicitor own client costs in the London ancillary relief proceedings are state to total £877,025. Of her total solicitor own client bill in London put at £1.4M only £30K has been paid on account, the rest of the work being done on credit. The husband's ancillary relief costs amount to £477,127. Mr Justice Johnson in his judgment described the preparation of the case in these terms:

"The extravagance of the preparations in this case defies moderate description. The husband's initial disclosure was in my view adequate, I would say more than adequate, for the purpose of these English proceedings. Nonetheless on the wife's behalf repeated requests were made for yet further information and yet further documents. The result is that there have been in court an astonishing 72 ring binders all of substantial size. The wife's repeated questions and demands for information were aimed at challenging the husband's present wealth and the various routes by which it came to him; and the past expenditures of the family. The information and documents which were provided by the husband were provided voluntarily and the court was never asked to adjudicate on the justification for the wife's demands. No doubt the husband was advised that to make an issue about the matter would create delay and perhaps even more expense; and that in any event the information might have to be forthcoming in the proceedings in the United States.

Be that as it may the consequence has been that the wife's legal costs in the various English proceedings have been a staggering £1,336,400 of which £877,025 is attributable to her costs in this application. The husband's total costs are £801,699 of which £477,127 is attributable to this application.

> The responsibility for this extravagant, and indeed scandalous, waste of money does not, I suspect, lie with the wife's English lawyers but rather with her attorneys in the United States. I note from the bundle of correspondence that when an open offer of settlement was made on behalf of the husband, the wife's solicitors made no effective response but asked only that any proposal for settlement should be directed by the husband's English solicitors to the wife's attorneys in Michigan."

I agree with every word of the quoted passage save that I have to wonder whether the exoneration of the wife's English lawyers is not over charitable. Whilst it is of course impossible to allocate responsibility for such scandalous expenditure there is at least a presumption of responsibility in the wife's English lawyers that would not be easily rebutted. Costs of this magnitude are almost unknown in this jurisdiction. They are a condemnation of our present procedures. On 1st October next new procedures are to be put on trial. These new procedures are designed to ensure amongst other objectives that the court and not the parties controls the escalation of costs.

Certainly the argument addressed to this court on the wife's behalf does not suggest a new moderation. Mr Munby submits that Mr Justice Johnson should have awarded his client not £10M but £100M. I will deal with

his various submissions in turn.

First he seeks leave to admit fresh evidence by an affidavit sworn by his instructing solicitor. He submits that the evidence in the Michigan proceedings shows that the husband has a net worth not of £400M as found by Mr Justice Johnson but of £800M. It did not seem that the application passed the *Ladd v Marshall* test in that the material was apparently available to the wife prior to trial. Beyond that Mr. Singleton demonstrated that in so far as the exhibited schedules emanated from the husband they contained no assets or valuations that were not available to Mr Justice Johnson. In so are as the affidavit exhibited another schedule from the wife's forensic accountant Mr Cendrowski, Mr Singleton emphasized Mr Justice Johnson's finding:

> "That he had approached his task in too partisan a manner had set himself, or more probably had set for him, the task of arriving at as big a figure as was sustainable."

Further in the exhibited schedule Mr Cendrowski continued to advance a basis of valuation that had been specifically rejected by Mr Justice Johnson. In the circumstances it was not surprising that Mr Munby did not pursue application in reply and I would unhesitatingly reject it and determine this appeal solely on the evidence in the court below.

Mr Munby's first criticism of Mr Justice Johnson is

that he was wrong to apply English domestic law rather than Michigan law. That is a manifestly hopeless submission. If the Family Division takes jurisdiction on the application of the principles in *De Dampierre v De Dampierre* [1988] AC 92 then, no matter where the parties originate and no matter what other State has concurrent jurisdiction, the court must carry out its statutory function arising under the Matrimonial Causes Act 1973 as amended.

Alternatively Mr Munby submits that Mr Justice Johnson should, in having regard to all the circumstances of the case, have reflected the scale of the award that would be the wife's due by equitable distribution in Michigan. Mr Munby claims that the judge in Ingham County would award the wife a minium of £100M and probably nearer £200M. This qualification seem to me far from proven. Neither party had difficulty in recruiting an expert Michigan lawyer. Whilst Mr. Feldman for the wife would endorse Mr. Munby's quantification Mr Prather for the husband asserts that under Michigan divorce statutes, when a party receives inherited or gift property, the non-donee spouse, in order to claim an interest in the property, must show that he or she has contributed to the acquisition, improvement or accumulation of the inheritance or gift property or that the potential marital estate and effects awarded to him or her will be insufficient for his or her support. This proposition says Mr Prather puts the husband's share of the Dart fortune

substantially beyond the wife's reach. In the absence of authority I would have concluded that the circumstances to which the judge may have regard under section 25 are so unbounded that the scale of the award in a concurrent jurisdiction in waiting cannot be entirely excluded. In very broad terms it might be equated to pre-nuptial contractual arrangements made by the parties in their country of origin that did not contemplate the subsequent development of a London jurisdiction. But there is authority directly in point. In the case of *Thyssen-Bornemisza v Thyssen-Bornemisza* (No 2) [1985] FLR 1069 the wife urged that any award should reflect the consideration that under Swiss law if, during the subsistence of the marriage, one of the spouses died, the survivor was entitled to one quarter of the fortune of the decedent. The court accepted that that was a relevant consideration since section 25(1) enjoined the court to have regard to the value of any benefit lost by reason of the dissolution of the marriage. However Sir John Arnold P continued:

> "It has also been urged upon us, as it was urged upon the judge, that by extension the court should also have regard to the Swiss law of divorce whereby it is said that a Swiss court, in exercising its jurisdiction as regards financial ancillary relief in consequence of the dissolution there of a marriage, would make some order of compensation, presumably to each of the spouses, for the

> loss of their chances respectively of inheriting from the other. It seems to me that by no possible construction of section 25(1) or interpretation of all other relevant circumstances would that matter of what the Swiss courts would do in such a contingency fall to be regarded by the English court, and I ignore that aspect of the matter."

Mr Munby's further submission that regard to the scale of the award in the concurrent jurisdiction is necessary to achieve harmonisation and to avoid discrepancy between jurisdictions drawn from the same common law root ignores the reality that such harmonisation of family justice systems, whilst desirable in theory, has proved elusive in practice. Chauvinism is universal and international negotiation that aims for uniformity seldom meets a smooth path, particularly in the field of ancillary relief. Furthermore it is arguable more appropriate for the UK to seek greater uniformity within the Council of Europe. Moreover harmonisation is not achievable by means other than international convention and the impracticalities that would result from the adoption of Mr Munby's contention are too manifest to be stated.

Mr Munby's next submission was that Mr Justice Johnson was wrong in law in holding that the husband was entitled to apply for an order against himself. Again this is to my mind a hopeless submission. The point was raised in

1979 in the broadly similar case of *Jagger v Jagger*. There the wife set up competing proceedings in an American State which she conceived would treat her more generously. The only material distinction is that her chosen State was California. In his endeavour to forestall her the husband applied for the determination of his financial liability to her. Mr Justice Eastham rejected the wife's submission that he had no right to make such an application. At page 35 of his unreported judgment he said:

> "Now there is an interesting point which I have delivered in open court had not both parties asked me, for understandable reasons, to give this judgment in chambers. The husband has got an interesting application for interim financial provision. The relevant section in the Matrimonial Causes Act is section 21. Having read that section I am satisfied that the court does have power on an application by a husband to order him at this own request to make interim financial provision for the wife. Rule 73 cannot take away that power. That rule was designed by the Rules committee to meet the ordinary case, and in the vast majority of cases it is wholly apposite to control the situation. However, in the exceptional case such as this, where the husband is paying a voluntary amount which he thinks is enough, and his wife does not think is enough but is presently unwilling to proceed under section 21 and is

> trying to proceed for support in California, I am of opinion that although the matter cannot be brought into the provisions of Rule 73 that the court of its own motion can give directions so as to enable it to exercise its undoubted powers under section 21."

The point was not pursued on the appeal to this court which was dismissed by judgment on 18th October 1979.

This jurisdiction to entertain an application by respondent for the determination of the extent of his liability is essentially required in these cases where very rich people indulge in competitive litigation concurrently in two jurisdictions. Were it otherwise the wife could frustrate a determination in the forum convenients if she conceived it ungenerous simply by declining to make any application.

Mr Munby next submits that the husband had failed to make full, frank and clear disclosure in a contentious paragraph of his skeleton. Its fallacies were fully exposed by Mr Singleton's response. The husband was consistent in his self assessment of his net worth of £400M throughout the proceedings from his affidavit of June 1995 to his oral evidence at trial. The contention that he as worth £489M was specifically rejected by the judge.

In the following paragraphs Mr Munby contended that the *Thyssen* defence is bad in law. I do not understand how that submission is relevant to this appeal since the

husband, under protest, abandoned that shield and gave comprehensive disclosure. The argument that the defence is bad in law is simply not open in a court which upheld the shield by its judgment in *Thyssen-Bornemisza v Thyssen-Bornemisza* (No 2) [1985] FLR 1069. In fairness to Mr Munby he conceded that this submission was appended to his principal submission and did not stand independently if the principal submission failed.

Turning now to that principal submission Mr Munby challenges what he calls the conventional jurisprudence, by which he means the judicial development of what appeared as section 5 of the Matrimonial Proceedings and Property Act 1970 on the 1st January 1971. He supports with enthusiasm the judgment of this court in *Wachtel v Wachtel* [1973] Fam 72 but challenges the entire corpus of subsequent decisions in this court on the application of the section 25 criteria to what are known as big money cases. Again in my judgment this is a hopeless submission. However since this judgment may be considered in due course by the courts of Michigan it might be helpful if I demonstrated its elementary failing. According to the law of England and Wales developed form the Ecclesiastical law by statute in and after 1857 financial provisions for wives after divorce could only be in the form of income payments, variously known as alimony, maintenance or periodical payments, albeit in certain circumstances secured by a

charge on some identified capital asset. The power to award a capital sum, labelled a lump sum, was first introduced by statute in 1963. Thus the Matrimonial Proceedings and Property Act 1970 was a most significant landmark in the development of the court's power to make financial provision for an applicant following a decree of divorce, judicial separation, or nullity. By adding to the existing powers a power to order the transfer or settlement of any realty or personalty Parliament introduced a remedy of equitable distribution. The enactment reflected profound social change and met compelling social need. Divorce had become common place and equality of rights for men and women had become reality. Within that reality women were more and more producing wealth as well as children. The manner in which this new power was to be exercised was defined by section 5 of that statute. That section has developed, with one significant subsequent amendment introduced in 1984, into section 25 of the Matrimonial Causes Act 1973 which regulates the outcome of this case. The statutory design was to give the judge exercising the power of equitable distribution the widest discretion to do fairness between the parties reflecting considerations and criteria laid out within the section. Parliament might have opted for community of property system or some fraction approach. It opted instead for a wide judicial discretion that would produce a bespoke solution to fit the infinite variety

of individual cases. The scheme of the Act must also be set in the wider perspective of history and of the general civil law. In this jurisdiction rights of property are not invaded or reduced by statutory powers save for specific and confined purposes. The purpose of this statute was to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses. Beyond that the power was not introduced to re-organise proprietary rights within families. After commencement on 1st January 1971 there was obvious curiosity and speculation amongst practitioners as to how this new power would be interpreted and utilized by the courts. In 1973 Lord Denning MR chose the case of *Wachtel v Wachtel* as a vehicle for the pronouncement of guidelines. He proposed a mathematical solution. If the applicant was to have periodical payments her capital share should be one third. If she were not to have periodical payments then her capital share should be one half. Nearly 25 years later it seems curious that he should have proposed a mathematical application when the statute itself not only did not speak of fractions but had clearly preferred the alternative approach. But practitioners and judges had been used to deciding the level of income support by reference to fractions prior to 1st January 1971. So the language of the Master of the Rolls was familiar if not innovative. Second the approach produced a manifestly fair result on the facts of that case which was not just a

typical case but the essentially typical case of a middle class family that had prospered through a long marriage in an inflationary era. Of course the decision was binding on this court and subsequent judgments have acknowledged its application in similarly typical cases. But behind those deferential acknowledgments lies the reality that it has been consistently rejected as an authority of general application. The real interpreter of section 25 and its predecessor was Ormrod LJ who between 1976 and 1981 demonstrated in a series of judgments in this court how section 25 should be utilised by practitioners in negotiating or judges in determining the fair result. This was one of his major contributions to the evolution of family law. In *O'D v O'D* [1976] Fam 83 he considered the limitations of *Wachtel v Wachtel*. He continued:

> "In other cases the situation is different. One or other, or perhaps both, spouses may bring in to the marriage substantial capital assets, or may acquire such assets during the marriage, by inheritance or by gift from members of their family. In such cases the expressions quoted above from the judgment of *Wachtel v Wachtel* and other to be found in ti, cannot be applied without modification. In these cases it is necessary to go directly to the terms of section 25 of the Act for guidance."

That was his simple but important insistence. The

judge must direct himself by reference to the section 25 criteria and not use fractions other than within the context of a broad analysis of outcome.

The greatest professional uncertainty was as to outcome in big money cases. The larger the figures the wider the band of possible discretionary conclusion. *O'D v O'D* was the first of the substantial cases to reach the Court of Appeal and it initiated a judicial evolution that culminated in the case of *Preston v Preston* [1982] Fam 17. Between *O'D* and *Preston* two other substantial cases had reached this court, namely *Sharpe v Sharpe* (unreported 16th July 1980) and *Page v Page* [1981] 2 FLR 198. Lord Justice Ormrod delivered the telling judgments in all four cases. In *Preston v Preston* he reviewed the evolution over which he had presided in these terms:

> "It is only in the rare cases where the assets are very large and there is no serious liquidity problem that it becomes necessary to consider the ultimate limits of the court's discretionary powers under this section.
>
> Hitherto, only three cases involving very large sums have reached this court, and one of them has not been reported."
>
> (He then reviewed *O'D, Sharpe and Page*.)
>
> "Although the decision in each of these cases depended largely on its individual circumstances, some general propositions can

> be extracted from them. In the first place the court should approach the problem by following the direction set out in section 25(1), ie by considering all the circumstances of the case and, in particular, the factors set out, seriatim in paragraphs (a) to (g) ....
>
> It is therefore wrong in principle to adopt a purely arithmetical approach by considering what proportion of the total assets should be allocated to the wife. The judgments in all three of the cases are agreed on this point the suggestion in *Wachtel v Wachtel* of one half or one third of the total assets is, therefore, no more than a guideline, though it may be a useful check on the tentative figure which emerges from working through the considerations set out in the section."

He then went on to consider propositions two, three, four, five and six, to some of which I will return later in this judgment. These citations demonstrate how hopeless is Mr Munby's submissions. For it flies in the fact of the clearest authority which is binding on this court. Authority apart, Mr Munby's submission demonstrates how sound was the guidance provided by Ormrod LJ through that era and how adrift would be the judge without that guidance. Mr Munby was pressed by my lady to demonstrate how the judge would determine the outcome in the present case were *Preston* wrongly decided and were *Wachtel* strictly applied to big

money cases. Mr Munby's response was that the judge would adopt the *Preston* approach and arrive at a figure, on his submission, in this case of about £20M. He would then divide the available capital by two to produce a figure of £200M. Finally he would work up from the bottom and down from the top to arrive at his conclusion. How this third and vital stage would be conducted Mr Munby was quite unable to explain. He simply said that the result of the third stage would be an award to his client of £100M. When asked what would be the outcome if the husband's fortune were £500M he responded, without much conviction, £110M. When asked what the award would be were the husband's fortune say £600M or £800M or £1000M he ceased to offer conclusions. The exercise only demonstrated that there is no basis for a judicial exercise of discretion in such uncharted waters.

Mr Munby's alternative submission was that if the statutory criteria offer the only guide then the courts have fallen into error in big money cases in treating the applicant's need as the paramount or determinative consideration when it should have no greater weight that the first consideration, namely the extent of the assets which each has or is likely to have in the foreseeable future. There is obviously more force in this alternative submission. It may have its origin in an elegant paper presented to the Family Law Bar Association by Mr. Peter Singer QC

(before his elevation to the bench) in May 1992 and it deserves careful consideration on the authorities. Again the all important judicial guidance is to be found in the judgment of Ormrod LJ in the cases already cited. In *O'D v O'D* he said this:

> "The next stage is to consider the wife's position, not from the narrow point of 'need', but to ascertain her reasonable requirements, bearing in mind that she will have to provide an appropriate home and background for herself and the children."

Then in *Preston v Preston* he said:

> "Secondly the word 'needs' in section 25(1)(b) in relation to the other provisions in the sub-section is equivalent to 'reasonable requirements', having regard to the other factors and the objective set by the concluding works of the sub-section."

From those passages it is implicit that reasonable requirements are more extensive than needs. As a matter of ordinary language what a person requires is likely to be greater than what that person needs. So the check on what the applicant subjectively requires is the word reasonable. There must be an objective appraisal of what the applicant subjectively requires to ensure that it is not unreasonable. Bu the objective appraisal must have regard to the other criteria of the section, obviously including what is available, the standard of living to which the parties are accustomed, their

age and state of health and, perhaps less obviously, the duration of the marriage, contributions, and pension rights both as affected by the marriage and as accrued or likely to accrue. Used thus the consideration of needs ceases to be paramount or determinative but an elastic consideration that does not exclude the influence of any of the others. As Mr Singleton rightly submitted in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to require what might be even an equal share. Therefore in my judgment the essential function of the judge in the big money case is to declare the boundary between the applicant's reasonable and unreasonable requirements applying all the statutory criteria to the myriad relevant facts of the individual case.

The next point that must be considered in this area is whether the court has power to make provision for a need that cannot be founded upon homes, children and lifestyle. Mr Munby by further alternative submission contends that there is no limitation to the purpose for which capital can be provided whilst Mr. Singleton supports the limited jurisdiction. Again I conclude that authority is on Mr Singleton's side. In *Page v Page* the applicant advanced additionally what might be said to be a requirement extraneous to her personal needs. Lord Justice Ormrod said:

"I do not, however, think that under section

> 25 it is legitimate to take into account, as the judge did, the wife's with to be in a position to make provision by will for her adult children who are in no way dependant on their parents or either of them."

Later this limitation appeared as the third of his propositions in *Preston v Preston* when he said:

> "Thirdly, the powers of the court ought not to be exercised for the benefit of adult children, by enabling the wife to set up a child in business, *Sharpe v Sharpe*; or to provide by will for a child who is unlikely to benefit under the husband's will or otherwise, *Page v Page."*

Later in *Preston v Preston* he said:

> "I think that on the true construction of section 25 there does come a point in cases where the available resources are very large, as counsel submitted, when the amount required to fulfil its terms 'levels off', and redistribution of capital as such, in some unspecified ratio begins, which is outside the section."

That principle was applied by this court in the case of *O'Neil v O'Neil* on 29th March 1983. The case was not contemporaneously reported but is now available at [1993] 2 FCR 297. The parties were rich. During the marriage the husband had transferred to the wife investment monies that provided her with sufficient independent income. But when

she left the former matrimonial home in Eaton Square she would need a home of her own. To meet that need the President awarded her £200K. He then said:

> "But that is not the end of it. It is very nice to have, and reasonable that a person in her position should have, some not vast but nevertheless adequate capital resource and I put that at £50K in this particular case."

This court struck out that surplus. Comming-Bruce LJ said:

> "Therefore, at that point I would hold, with respect to the President, that having regard tot he wife's capital resource, there was no good ground to impose upon the husband as an addition to the £200Kwhich he had to provide for the purpose of accommodation, another £50K against a rainy day (if that is the right way of putting it) if the wife felt that she needed liquid capital."

Sir David Cairns expressed himself in very similar terms:

> "With great respect to the President, in the circumstances of this case, I do not consider that the husband should be called upon to pay to his former wife who, on the President's finding already has enough capital to furnish her income needs, a sum which is sufficient to provide her with not only a home but a further capital resource."

In October 1982 another division of this court had taken a different position in the case of *In re Besterman, deceased* [1984] 1 Ch 458, the court reviewed a claim under section I of the Inheritance (Provision for Family and Dependants) Act 1975 but, since it was a claim by a surviving spouse, applied the criteria of section 25. In the leading judgment of Oliver LJ there is this passage:

> "It has been pointed out more than once that the calculation in cases of this sort is, of necessity, not one where any precision is possible, but for my part I take the view that reasonable provision in this case would dictate that, in addition to the secure roof over her head, the widow should have available to her a capital sum of sufficient size not simply to enable her purchase an adequate annuity according to present day needs, but to provide her with the income which she needs and a cushion in the form of available capital which will enable her to meet all reasonably foreseeable contingencies."

Later in the judgment he said:

> "I desire to emphasise what has been said, no doubt, many times before, that each case in this jurisdiction depends upon its own particular facts and I think it would be a pity if this case should be used as a basis for drawing general deduction of principle to be applied in other and probably quite different

cases, whether of large or small estates."

Lord Justice Oliver must be disappointed by subsequent developments. From the passage that I have cited has been extracted the phrase 'The *Besterman* cushion'. It is an authority invariably cited by applicants where the assets are substantial. *Besterman* was not cited in *O'Neil* and, in so far as there is any conflict between them I consider that *O'Neil* sits more comfortably in the range of the decided cases. Since *Besterman* was an Inheritance Act case, none of the three judges in the court had had experience of the application of 25 at first instance. In any event I regard the distinction between the two cases more one of terminology than outcome. In one the additional capital sum can be said to be within the applicant's reasonable requirements and in the other without.

In relation to the instant appeal, Mr Justice Johnson walked elegantly over this rough terrain. Having referred to both *Besterman* and *O'Neil* he said:

> "In the present case however, emphasising that need is only one of the statutory criteria, it seems to me that, as a matter of justice, this particular wife has reasonable requirements over and above those which I have accepted as being necessary for her annual routine expenditure."

He then went on to award her an additional £3M.

Before leaving this area of the appeal I wish to record for completeness that the propositions evolved by Ormrod LJ were not affected by the substantial amendment of section 25 introduced by the Matrimonial and Family Proceedings Act 1984. In *Thysen-Bornemisza v Thyssen-Bornemisza* (No.2) this court considered the proper approach to the resolution of a case which had certain similarities. The husband put his fortune at £400M and there had been a substantial battle to establish which jurisdiction would determine the financial claims. In determining the extent to which the husband should be obliged to disclose his financial circumstances the President said:

> "One knows, however, from the cases of *Preston v Preston* and *Page v Page*, both in this court, that the ambit of sections 23 and 24 does not extend so far as the making of an order for the purpose of enabling the recipient to benefit from the order himself or herself by being in a better position to make testamentary dispositions in favour of a third party or, as it is said, purely for the purpose of the redistribution of capital as an individual motive.
>
> It seems to me that those limitations lead to the view that the largest amount which could legitimately be provided for, whether by a lump sum order under section 23 or an adjustment of property order under section

> 24 or by a combination of the two mechanisms, is not so large that it could increase over and above what would be justified by the husband of a fortune of £400M by the proof of a larger fortune than that."

Griffiths LJ added:

> "Accordingly I believe that we should do a service to (the wife) if we were to state here and now that under English law she has no prospect of receiving a significantly higher award because her husband might turn out to have a fortune in the order of £1,000M rather than of £400M."

That this approach is still consistently applied a decade later is demonstrated by the case of *Flick v* Flick reported at first instance at [1995] 2 FLR 45.

I come at last to what might be termed Mr Munby's last ditch argument. For me it is the only one that has any reality or substance. He submits that even if Johnson J adopted all the right principles he manifestly fell into error as he drew his final conclusions. Although he made passing reference to the wife's liability for costs he clearly ignored that consideration when calculating what would be available to her after his judgment had been implemented. At page 27 he recorded:

> "The wife already has the house in Okemos which I take as representing £1M and I have

had regarding to her outstanding liability for her own legal and other professional costs."

On the following page he then reached this conclusion:

> "Rather does it seem to me that it is a reasonable requirement of this wife, particularly given the financial assets available, that she should have available to her a capital sum to enable her to indulge herself in terms of capital expenditure or additional annual commitment over and above those for which I have provided for her annual routine support. Such items might include some particularly splendid outfit for some particular event, the occasional use of chartered planes, the purchase of picture, or even of a small second home."

He reiterated this conclusion on the following page in these terms:

> "However I am firmly of the view that it is a perfectly reasonable requirement of this wife that she should have available a fund out of which she can chose to meet some occasional expenditure, perhaps even luxury, over and above what I have regarded as her reasonable routine need."

Mr Munby's simple submission is that the judge, having recognised that it was appropriate for her to have a

capital fund to provide for exceptional luxury expenditure and having put a figure of £3M on that fund, failed to perceive the reality that the wife's costs liabilities would consume the fund to deprive the wife of what the judge had held to be her appropriate entitlement. As a matter of arithmetic he put the wife's liability to her London solicitor at £1.4M, her liability to her Michigan attorney at £1M and her liability to meet orders for costs in favour of the husband at about £0.6M. Of course at that stage the judge should not anticipate what order he might make in relation to the ancillary relief costs since he would not know what negotiations had taken place or what other arguments might be specifically advanced on costs. Equally the wife's liability to her Michigan attorney could not be said to be a concrete liability until the judge in Ingham County had ruled upon them and I cannot think that that observation is met by Mr Munby's assertion that in Michigan the courts do not make orders inter parties. However that may be the wife's debt to her London solicitor together with her liability to pay the husband's costs of the unsuccessful stay application together exceed £1.5M. Therefore, even if Mr Munby has put the point high, the fact remains that the very substantial addition for extraordinary expenditure will be eliminated or substantially eroded by a liability to which the judge made only passing reference. Mr Munby's contention is that at the barest minimum the judge's award must be increased by

£3M to ensure that the ability to afford extraordinary items is preserved. In this submission there is, of course, a fundamental fallacy. If there are outstanding orders for costs in previous proceedings between the parties and if the court concludes that the applicant has incurred costs in the application before the court to a scandalous degree, the court's power to control abuse by sanction would be enasculated if the applicant could include a costs liability, actual or potential, as a factor to be reflected in the lump sum award. However the fact remains that in his judgment he failed to make any reference to the consequential effect upon the wife's economy of the liability to which he briefly referred. This criticism does establish a deficiency in the judgment. It was clearly open to Johnson J to have expanded his judgment in such a way as to demonstrate conclusively that he had overlooked nothing. Having found in the passages at pages 28 and 29 that she was entitled to a capital fund to enable her to indulge herself, he might have continued by recording that she had forfeited that entitlement by her prodigal conduct of the litigation. His failure to do so is an error but it is in the end an immaterial error if this court concludes that in exercising its appellate discretion it would only expand the words of judgment without altering the ultimate award. Put another way was this an arithmetical error, as Mr Munby submits, or was it compressed rationalisation within which the judicial

intention is plain? In my judgment it was plainly the latter. The prodigal person often anticipates an expected receipt and spends it before it comes. I see no reason why the wife, having wasted a part of her entitlement in advance of receipt, should be able to contend with any merit that she should have it paid twice.

A distinct but inter-related question is whether it was a justifiable exercise of judicial discretion not only to deny to the wife her costs of the application but also to condemn her in the husband's costs. Undoubtedly the order that he made was a very unusual one but he justified it on two specific grounds, first that the wife had prolonged the litigation unnecessarily by refusing the open offer that substantially exceeded the award and second that she had caused the case to be conducted in an extravagant way to the husband's prejudice. Both considerations are in my judgment valid and I am satisfied that the order does not exceed the judge's wide discretion in the field of costs and is consistent with the principles stated by Nourse LJ in re *Elgindata Ltd* (No.2) 1 WLR 1207.

Accordingly it is my clear conclusion that in all the circumstances of this case it is just that the wife's entitlement to extravagant expenditure should be forfeit or largely curtailed by the costs liabilities that were in Johnson J's contemplation as he composed his judgment and those which subsequently resulted from his determination of the

application for costs.

There is no judge of the Division better qualified than Johnson J to decide a case of this order. He appeared as Queen's Counsel in four of the evolutionary cases to which I have referred. His judgment reveals his complete grasp of the field and his clear understanding of the judicial task to apply the statutory criteria tot he facts as he found them. Mr Munby's comprehensive attack has revealed only one flaw and the correction of the flaw, which is essentially a flaw of expression, does not lead to a different result. I do wish to add one general observation on Mr Munby's bold attack on the case law. As he conceded, this court is not free to accept a submission which could only realistically be addressed to the House of Lords. But as I have demonstrated the law in the field of big money cases has been settled for over a decade. That certainty has enabled practitioners to negotiate settlements in a large number of cases. Those that have the misfortune to reach the Court of Appeal are happily only a tiny minority. But manifestly even the greater number that are concluded without substantial litigation are insignificant in number and importance to those who legislate and those who form social policy. The statutory basis upon which the financial affairs of divorcing couples are decided has now been in place for a quarter of a century. It has been well tried, its operation is well understood by practitioners and it has in my

estimation served society well. If a fundamental change is to be introduced it is for the legislature and not the judges to introduce it. Not only is the legislative process the democratic process but it enables the route of future change to be surveyed in advance of adoption by extensive research and consultation. That such a process may be in embryo is demonstrated by the Government's response to an amendment laid down to the Family Law Reform Bill currently in Parliament. The amendment sought to replace section 25 of the Matrimonial Causes Act 1973 with the statutory code currently in force in Scotland. Hansard for 16th May 1996 shows that the Lord Chancellor has agreed that he will initiate a consultation process to evaluate the merits of adopting the Scottish system by referring the issue to his Ancillary Relief Advisory Group at the beginning of 1997.

For all these reasons I would dismiss this appeal.

LORD JUSTICE PETER GIBSON: I also agree that this appeal must be dismissed for the reasons given by Thorpe L.J. But in deference to Mr. Munby's argument, I would add a few words on his main submission that Johnson J. adopted an incorrect approach to the application of s.25 Matrimonial Causes Act 1973. I have to say that for me that submission had somewhat greater force than it has for Thorpe L.J. with his incomparably greater experience in this field. Mr. Munby frankly acknowledged that his submission

ran counter to the long-standing practice of Family Division judges over many years and he recognised that it might need to be addressed to a higher court than this court to gain acceptance.

Looking at the statutory provision in the absence of authority and leaving aside those provisions which relate to children, I observe first that by s.25(1) a duty is imposed on the court in deciding whether to made a property adjustment order to have regard to all the circumstances of the case. That could not be wider. By sub-section (2) regard is in particular to be had to matters included in the 8 lettered paragraphs. Para. (a) includes "the .... property and other financial resources which each of the parties to the marriage has". That to my mind casts doubts on the correctness of an approach in a "big money" case that treats as immaterial the actual amount of the property and other financial resources of the respondent once it is shown that they are sufficient to meet the reasonable requirements of the applicant. Para. (b) refers to the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future. An approach which determines the quantum of the award by reference only to the reasonable requirements of the applicant again seems to me to be arguably incorrect.

I of course appreciate that in the present case the Judge expressly disclaimed feeling limited by any ceiling or

arbitrary limit to the amount which he could award the applicant wife and said that he was not limited to her reasonable requirements. However when putting together his award, the Judge added to the £6 million which was his assessment of her "reasonable annual routine needs" a further capital sum which it was "a reasonable requirement of this wife" to have available to her. And a little later he said that it seemed to him that this particular wife had "reasonable requirements" over and above her annual routine expenditure. By that route he arrived at the overall figure of £10 million and in doing so he faithfully followed the practice of the Family Division.

But the statutory discretion, it seems to me, might have been differently interpreted by the courts to allow a more generous approach to the applicant in a big money case, so that the award was not in effect limited by the applicant's reasonable requirements. Para. (b) is but one of the paragraphs to which particular regard is to be had, and both parties' reasonable requirements must be taken into account. Other paragraphs refer to matters which have had nothing to do with the applicant's financial needs, for example para. (d) with its reference to the duration of the marriage and para. (g) with its reference to conduct. And I come back again to the width of s.25(1). I entirely accept that in a big money case it is a relevant and important consideration whether the wealth of the respondent is largely

attributable to his inheritance and whether the applicant contributed to that wealth. I also accept that once one goes beyond the reasonable requirements of the applicant, the exercise of discretion becomes more difficult to explain in a way that can ensure consistency of approach by the courts. Nevertheless standing back and looking at the position overall, were I unconstrained by authority I would have to say that I regard an award of £9 million to a good wife in a marriage of 14 years and a good mother tot he respondent's children out of the respondent's resources of £400 million as on the low side.

However for the reasons given by Thorpe L.J. and in the light of the authorities to which he refers, I do not think it open to this court to hold that the "millionaire's defence" is wrong in law or that an award based on the wife's reasonable requirements can be impugned. Preston v Preston [1982] 2 F.C.R. 297 seem to me to be particularly significant decisions of this court binding on us.

I too would dismiss this appeal.

LADY JUSTICE BUTLER-SLOSS:

I agree with the judgment of Thorpe LJ which I have read in draft.

Two main issues arise in this appeal. The first is the form of discovery of documents and whether it is necessary to have detailed information about the assets of a husband

who is able to pay any sum ordered by a court in ancillary relief proceedings. The answer to that quest can, in my view, better be determined by an answer to the second question, that is to say, whether the judge correctly exercised his discretion in awarding the wife a lump sum order of £9 million when the assets of the husband were about £400 million. If the judge's approach to his task was correct then it was entirely unnecessary to investigate his assets and vast sums of money were wasted on a fruitless exercise.

The Matrimonial Causes Act 1973, as amended in 1984, provides the jurisdiction for all applications for ancillary relief from the poverty-stricken to the multi-millionaire. It is obvious that a court, in the exercise of the discretion provided by sections 25 and 25A, will apply the relevant criteria according to the widely differing facts of each case before it. In the low income cases the assessment of the needs of the parties will lean heavily in favour of the children and the parent with whom they live. If, therefore, the only asset is the house, and the mother is caring for the children, she will get the house and probably outright, even though the effect of that order is to deprive the husband of the whole of the capital accrued during the marriage and directly financed from his resources.

At the other end of the scale, the affluent and the very rich families may have acquired it all during the

marriage and by the efforts of both spouses by way of a working as well as a marriage partnership, see for instance *Gojkovic v Gojkovic* [1992] Fam. 40. In the case of a wife whose contribution to the marriage is indirect by way of keeping the home and hearing and bringing up the children, the well-known observation of Sir Jocelyn Simon, President in a lecture in 1965, and recorded in the judgment of the Court of Appeal in *Wachtel v Wachtel* [1973] Fam. 72 at page 92 in apposite. He said:-

> "The cock can feather the nest because he does not have to spend most of his time sitting on it."

It is however useful to remember the context in which he said it. Ancillary relief orders prior to the 1960's did not provide for any capital distribution unless there was a trust. In 1963, for the first time, the courts were given the power to award lump sums, which were modest. It was not until the Matrimonial Causes Act 1970, re-enacted in the 1973 Act, that an order for transfer of property was introduced. The President was speaking at a time when the indirect contribution of a wife was not widely recognised and the normal order was a maintenance order for the wife during the joint lives of the former spouses or secured for her life.

Gradually the importance of the different contributions made by the spouses during their marriage has been recognised in a series of cases since the 1970s. The

approach of the courts has inevitably reflected the type of case coming before them. Orders vary from the applicant spouse receiving the whole or the larger part of modest assets to receiving a small proportion of a large fortune. The exercise of discretion and the criteria laid down in section 25 of the 1973 Act as amended have to encompass the enormous variations in the circumstances of each case coming before the courts.

This appeal relates to a 'big money case'. Although such cases do not arise in the English jurisdiction frequently, in the last 20 years or so, side by side with the working out of the principles extracted from the matrimonial financial legislation in cases of moderate or modest available capital, there has grown up, as Thorpe LJ has explained in his judgment, a body of decisions on 'big money' cases which bind this Court. Mr Munby QC has, with great skill and much ingenuity sought to set aside those decisions in favour of a broader brush approach which would result in far larger orders being made to spouses of millionaires.

Mr Munby suggested that the wording of section 25 implied a starting point of one half. Not only is it clear from the decided cases that such is not the case, but interestingly it is clear from proposed legislation to which we have been referred in Hansard that in Parliamentary debate, at least, such a starting point was not even contemplated by those arguing from whichever point of view

of the existing legislation.

In the process of applying the section 25(2) criteria to the facts of this case, the needs of the wife is a highly relevant factor. Needs has been defined by Ormrod LJ in *Page v Page* [1981] 2 FLR 198 at page 201 as the 'reasonable requirements' of the spouse seeking an order. Where the resources are great Ormrod LJ in *Preston v Preston* [1982] Fam 17 said at page 28 that there had to be a levelling off or a ceiling on the amounts to be taken into account.

Although Mr Munby does not accept the principle of a ceiling as such, he does recognise that the starting point is far below the 50-50. He suggested £100 million as a starting point, well below half of the figure found by the judge to comprise the assets, and he recognised that, in the Michigan court the wife might be awarded substantially less. I have no doubt, however, that we are bound by the line of decisions in which Ormrod LJ gave the leading judgments and that we have to recognise a levelling off in a case with capital of this size.

The court is not bound by any percentage but must have regard to all the relevant criteria in section 25(2). The judge considered the wife's reasonable requirements together with all the other relevant factors in coming to his decision. In doing so he also took into account that the wealth has

been generated by the husband's family and the wife has made no direct contribution to the family business which is another highly relevant factor both in our jurisdiction and, we understand, in the Michigan legislation. Within the principles enunciated in the line of cases set out in the judgment of Thorpe LJ there is no ground upon which this appellate court might interfere with his exercise of discretion or substitute a higher figure than the award made by the judge in his excellent judgment.

I agree with Thorpe LJ, for the reason which he has given, that we should not interfere with the effect of costs upon the lump sum awarded.

I would however add one further matter, I am glad to see that a consultation process is proposed to reconsider the existing the criteria laid down in section 25. I am sure that any change in the way in which the courts should decide money cases ought to be by legislation. The practice is ancillary relief has become settled. It is well known among practitioners and clear principles are essential in order to assist large numbers of spouses and their legal advisers who make post-divorce financial settlements and apply for consent orders. The Court of Appeals must not set the cat among the pigeons.

I should however like to feel that within the consultation process the views expressed by Peter Singer QC

in 1992 were carefully considered. I share the doubts raised by Peter Gibson LJ in his judgment. I wonder whether the courts may not have imposed too restrictive an interpretation upon the words of section 25 and given too great weight to reasonable requirements over other criteria set out in the section. On the present state of the law as interpreted in the authorities Johnson J's order is clearly right. If this appeal was not bound by authority I would not wish to make an order of a kind suggested by Mr Munby, but as the sums with which the courts are asked to deal become very large indeed, it may be that we are now perhaps somewhat over-modest in our awards.

On the first issue of discovery, I have no doubt that the Thyssen defence to detailed requests for discovery is entirely appropriate even if the award had been substantially greater than £9 million. I too would dismiss this appeal.

Order: appeal dismissed with costs; stay refused; application for leave to the House of Lords refused.